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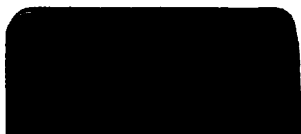
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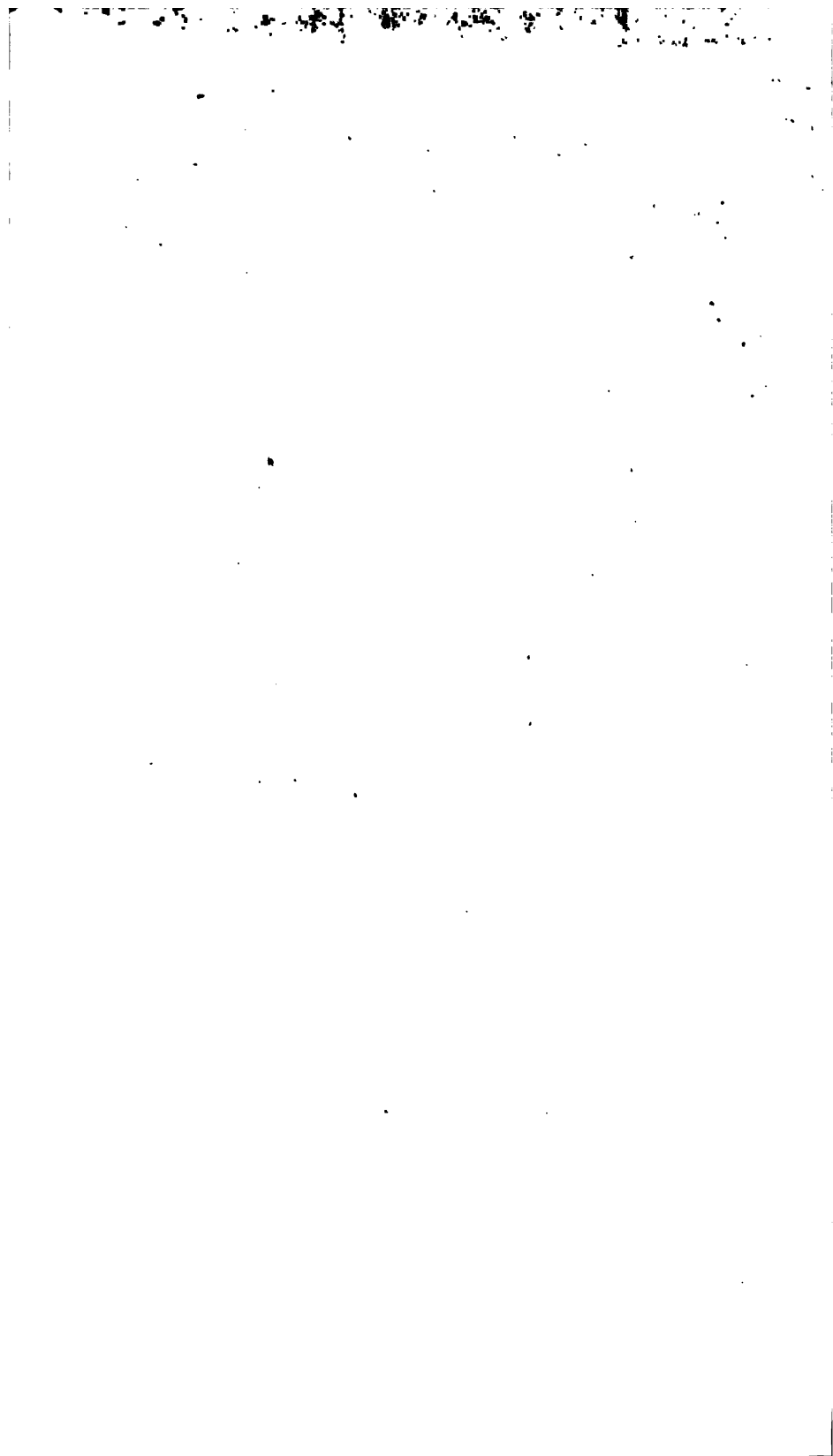


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REPORTS OF CASES
DECIDED IN THE COURTS
OF THE
FOURTH JUDICIAL CIRCUIT
SITTING IN ADMIRALTY.
BEING
HUGHES' REPORTS.
VOL. V.

EDITED BY
ROBERT M. HUGHES, M. A.,
OF THE NORFOLK, (VA.) BAR.

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PREFACE.

THE present volume is a collection of the decisions of the Courts of the Fourth Circuit on Admiralty subjects which are not included in the various reports of this Circuit already published. Some of the cases contained in this volume have previously appeared in print. The first six were selected from old numbers of Hall's Law Journal (a magazine long out of print and scarce), and a number of the remainder have appeared in the Federal Reporter. But it was nevertheless deemed advisable to insert them, so as to make the volumes of Hughes' Reports an epitome of the Federal decisions of the Circuit—the more so, as the facilities for, prompt publication afforded by the Federal Reporter will render unnecessary the continuance of the present series.

It is to be regretted that reporters have not hitherto adopted more frequently the plan of collecting Admiralty decisions into separate volumes. The practitioner who desires to make a specialty of Admiralty finds the law on the subject scattered through scores of volumes of Federal Reports, many of them scarce and all costly. He may frequently have to purchase an entire volume for the sake of a single case. Hence, until late years the decisions of one Circuit have been practically inaccessible to the Bench and Bar of another. The result has been a serious conflict of authorities on many points of Admiralty law. The comparative cheapness of the later Federal Reports as compared with the old, the increase of Association law

libraries, and, above all, the foundation of the Federal Reporter will gradually make this conflict disappear. In fact it is already disappearing, and under the influences above specified the system of Admiralty law is daily becoming more homogeneous and less fettered by the restrictiveness of former judges. And although in the past, a support might not have been secured for such a publication, yet considering the unexampled growth of Admiralty jurisdiction and litigation in the past decade, the day is not far distant when a magazine devoted exclusively to Admiralty in America will be established and generously sustained. Then the Admiralty lawyer will no longer be obliged, in order to keep posted in his profession, to cumber his library with hundreds of pages of mere descriptions of patent machines, or discussions as to whether some town ought to be made to pay her bonds. The plan of reporting by subjects instead of by states or circuits is certainly the proper plan and as certainly the plan of the future.

A few cases have been incorporated in this volume which, while not strictly speaking a part of Admiralty law, are so cognate thereto as to have been deemed worthy of insertion.

The Reporter, not wishing to make the judges responsible for his head-notes, has distinguished by an asterisk (*) those which were prepared by himself, leaving without any distinguishing mark those prepared by the judges.

Some of the cases have been annotated by additional authorities on the question decided; care being taken however not to use such notes as a means of inflicting the private opinions of the Reporter on the Profession. He regrets that the demands of his practice prevented him from making these notes more extensive.

NORFOLK, VA., Sept. 11, 1882.

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UNITED STATES CIRCUIT AND DISTRICT COURTS.

FOR THE FOURTH CIRCUIT.

*United States Circuit Court, District of South Carolina,
28th May, 1808.*

EX PARTE ADAM GILCHRIST AND OTHERS v. THE COLLECTOR OF THE PORT OF CHARLESTON.

Before JOHNSON and BEE, Judges.

The circuit court has power to issue a mandamus to a collector, commanding him to grant a clearance. All instructions from the executive which are not supported by law are illegal and no inferior officer is bound to obey them.

EMBARGO.

A motion was made by Mr. Ward for rule on the collector to show cause why a mandamus should not be issued against him, to compel the granting of clearances for the ship *Resource*, Moreton; ship *Two Pollies*, Wilder; ship *Navigator*, Bowden; ship *Rising States*, Anderson; and ship *Louisa Cecilia*, Fowler, founded on the following affidavit:

“Adam Gilchrist and J. S. Barker, of Charleston, merchants, being severally sworn according to law, depose, that the American register ship *Resource*, arrived from a foreign voyage in the port of Charleston about six months since, owned one half by the deponent, J. S. Barker, residing in Charleston, and the other half by American citizens resid-

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ing in Baltimore; that the deponent representing the owners aforesaid, apprehensive that the bottom of the ship might, by her being detained here during the embargo, be totally destroyed by worms, did for that reason determine on sending her to Baltimore and regularly advertised for freight to said port of Baltimore; that having obtained the promise and actually engaged the freight of about six hundred bales of cotton, it became requisite to ship either ballast or heavy freight, so as to enable the said ship to be navigated with safety; the ballast not being obtainable, these deponents, about three weeks since, agreed to carry to Baltimore about two hundred barrels of rice, freight free; and that the same was shipped by permit from the custom house and under the inspection of a revenue officer about two weeks since; that on application for a clearance of the said ship and her cargo to Simeon Theus, collector of the port of Charleston, duly commissioned and authorized to exercise and perform the duties of said public officer of collector of the port aforesaid, he hath refused to grant a clearance to said vessel and cargo, alleging that although he hath no suspicion that the clearance demanded is to cover an ostensible voyage to Baltimore, or to infringe or evade the existing laws relative to the embargo, and although he admits that the said ship was laden previously to his receipt of the act of congress, respecting the embargo, under date of the 25th April, ult., yet that he is bound to refuse such clearance, under the directions of the executive of the United States, which he conceives he is bound to obey; that these deponents have just right under the law to obtain from said Simeon Theus, collector as aforesaid, the clearance so withheld and refused to be granted.

ADAM GILCHRIST,

J. SANFORD BARKER.

Sworn before me this 24th day of May, 1808.

JOHN WARD, Q. U.

Upon the return of the rule the defendant showed the following cause:

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United States, South Carolina District, Federal Circuit Court.

EX PARTE SIMEON THEUS, ESQ., COLLECTOR OF THE
PORT OF CHARLESTON.

RULE to show cause why a mandamus should not issue, requiring him to grant clearances of certain vessels.

Simeon Theus, collector of the port aforesaid, on whom a copy of the above rule has been served for cause, sheweth:

"That in and by a certain act of congress of the said United States, passed the 25th day of April, 1808, it is, in the 11th sec. thereof, among other things, enacted: 'That the collectors of the customs be, and they are hereby respectively authorized, to detain any vessel *ostensibly* bound with a cargo to some other port of the United States, whenever, *in their opinion*, the intention is to violate or evade any provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon.' Also, that in and by a certain circular letter from the treasury department of the United States, dated the 6th of May, 1808, and addressed to the said Simeon Theus, as collector aforesaid, he is instructed as follows: [Here follow the circular instructions of Mr. Gallatin.] That the said Simeon Theus, collector as aforesaid doth not detain the vessels as aforesaid, under the act aforesaid, because in his opinion there is no intention in the parties aforesaid to violate or evade any of the provisions of the acts laying an embargo, but that he detains them under the instructions he has received in the letter aforesaid, and which as a public officer he thinks he is bound to obey. That being unwilling, on the one hand, to injure individuals, and, on the other, equally so, to commit a breach of his duty, he submits the question to the court, upon the cause above shown.

SIMEON THEUS, Collector."

The case was then submitted without argument.

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JOHNSON, J. The affidavit, upon which this motion is founded, states, that the ship *Resource* is ballasted with 140 barrels of rice, under a load of cotton, and is destined for the port of Baltimore. The collector, in his return to the rule, acknowledges, that he believes the port of Baltimore to be her real destination; and that, if he had no other rule of conduct but the 11th section of the act supplementary to the embargo act, he would not detain her; but urges in excuse, for refusing her a clearance, a letter from the secretary of the treasury. It is not denied that if the petitioners be legally entitled to a clearance, this court may interpose its authority, by the writ of mandamus, to compel the collector to grant it. The only questions, therefore, will be, whether the section of the act alluded to, authorizes the detention of the vessel; and if it does not, whether the instructions of the president, through the secretary of the treasury, unsupported by act of the congress, will justify the collector in that detention. On the latter question there can be no doubt. The officers of our government, from the highest to the lowest, are equally subjected to legal restraint; and it is confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty. In the letter alluded to, Mr. Gallatin speaks only in the language of recommendation, not of command; at the utmost the collector could only plead the influence of advice, and not the authority of the treasury department in his justification.

In the act of congress there is no ambiguity. The object is to prevent evasions of the embargo act, by vessels which sail ostensibly for some port in the United States, when their real destination is to some other port or place. The granting of clearances is left absolutely to the discretion of the collector; the right of detaining in cases which excite suspicion is given him, with a reference to the will of the executive. Congress might have vested this discretion in the president, the secretary of the treasury, or any other officer, in which they thought proper to vest it; but, having

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vested the right of granting or refusing in the collector, with an appeal to the president only in case of refusal—the right of granting clearances remains in him unimpaired and unrestricted.

It does not appear to us that the instructions from the treasury department are intended to reach this case. The recommendation not to grant clearances on shipments of provisions appears by the context to be restricted by two provisos, evidently pointed at by the reasons assigned for that recommendation. First, if intended for a place where they are not wanted for consumption, or we suppose, where supplies of the same article can be had from the state or neighborhood in which such place is situated. Secondly, for a port that usually exports that article. Now with regard to the article of rice, it is impossible to say how much the city of Baltimore will want for its consumption, as they have no internal supplies, and as the three southern states alone are exporters of that article. Shipments of rice from Baltimore to Charleston might create suspicion, but not such shipments from Charleston to Baltimore. We are of opinion that the act of congress does not authorize the detention of this vessel. That without the sanction of law, the collector is not justified by the instructions of the executive, in increasing restraints upon commerce, even if this case had been contemplated by the letter alluded to; but that from a temperate consideration of that letter, this case does not appear to come within the spirit and meaning of the instructions which it contains.

A mandamus was ordered accordingly, commanding the collector to grant a clearance to the *Resource*.

Letter from the attorney-general to the president of the United States, relative to the proceedings of the circuit court of South Carolina in the case of the *Resource*:

SIR:—I have read and considered the papers and documents referred to me relative to the case of a mandamus,

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issued by the circuit court of the United States for the district of South Carolina, to compel the collector of the port of Charleston to grant clearances to certain vessels.

The first question that naturally presents itself, is, whether the court possessed the power of issuing a mandamus in such a case.

A mandamus in England is styled a prerogative writ, and in that country is awarded solely and exclusively by the court of king's bench.

The constitution and laws of the United States establish our judicial system. To these we must refer, in order to ascertain the jurisdiction of the respective courts, the extent of their powers, and the limits of their authority.

The "act to establish the judicial courts of the United States," passed the 24th September, 1789, declares and defines the jurisdiction of the several courts thereby created, and among these the jurisdiction of the circuit courts. Upon a careful and attentive perusal, it will be found to delegate to the circuit courts no power to issue writs of mandamus. In the thirteenth section of that act, this authority is expressly given to the supreme court of the United States. In like manner it is specially provided by the act of the 3d February, 1801, that the supreme court shall have power to issue writs of mandamus. This last act having been repealed and the former revived, the question must rest on the true construction to be given to the original act.

The eleventh section defines and limits the jurisdiction of the circuit courts. It is specially appropriated to this single object. There are no expressions in this section which can fairly be interpreted to confer the authority of issuing writs of mandamus; nor can the power be either implied or inferred from any language it contains. It is true, the proceeding by mandamus in England is on the crown side, as it is termed, of the court of king's bench. But it is a prosecution relative to a civil right to enforce it, and to obtain prompt redress; and not to punish criminally as in the case of an offense. The provision therefore that the circuit courts "shall have exclusive cognizance of all

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crimes and offenses cognizable under the authority of the United States, except where the act otherwise provides," etc., cannot warrant such a proceeding. Besides, the same act does provide that the supreme court shall issue writs of mandamus. An authority given, perhaps, because its jurisdiction extended all over the United States.

The fourteenth section, immediately succeeding that which gives this authority, in plain and positive terms, to the supreme court, solely, if not exclusively, (and the affirmative frequently, and in this case justly, I think, implies a negative) contains the following provision: "All the before mentioned courts of the United States, (including the supreme as well as the circuit and district courts) shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions." This clause cannot affect the case, I conceive. The mandamus is a writ which, we have seen, is specially provided for by law. This section was evidently not designed to give any additional jurisdiction to either of the courts, but merely the means of executing that jurisdiction already granted to them respectively. The issuing of a mandamus in the case under consideration was an act of original jurisdiction. Precisely as much so, as it would have been in the supreme court, to have exercised the power in the case of *Marbury v. Madison*. In that case the supreme court declared, that to issue a mandamus to the secretary of state, would be, to exercise an original jurisdiction, not given by the constitution; and which could not be granted by congress. The constitution having enumerated or declared the particular cases in which the supreme court should exercise original jurisdiction, though there were no negative expressions, the affirmative, they considered, implied them. It was on this principle alone they refused to exert their authority.

The practice, I believe, has uniformly been, so far as I can trace it from the books of reports that have been published, or from recollection and experience on the subject, to apply

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to the supreme court for a mandamus. This court it is true have determined not to issue the writ, when it would be an act of original jurisdiction. But this I apprehend, can afford no ground for the circuit court's assuming an authority which the supreme court have declined, unless by a legislative act the power be delegated to them. This power is not inherent nor necessarily incidental to a court of justice, even of general jurisdiction. For in England but a single one, of several courts having general jurisdiction, possesses the authority. Neither the chancery, the common pleas, nor the exchequer, though classed among the king's superior courts and having general jurisdiction over the realm, can exercise this power. It is the peculiar privilege of the king's bench alone. Our circuit courts have merely a local and subordinate jurisdiction. Their analogies therefore with the four courts of England, having general and superior jurisdiction, must be very weak, and still weaker their claim to the pre-eminent distinction of the king's bench, which possesses solely the exclusive authority of issuing the mandamus.

For these reasons I am induced to believe from the best consideration I have been enabled to give the subject, that the circuit court of South Carolina had no authority to issue a mandamus to the collector of the port of Charleston.

It is scarcely necessary to remark, that when a court has no jurisdiction, even consent will not give it; and much less will the mere tacit acquiescence of a party, in not denying their authority.

Independent of this serious and conclusive objection to the proceeding adopted by the court there are others entitled to consideration. For supposing the court did not err in the exercise of jurisdiction, and admitting the British doctrines on the subject without restriction or limitation could be extended to this country, there are legal exceptions to the course they have pursued, supported by English authority.

In the first place, the law gave the collector complete discretion over the subject. According to the opinion he

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might form, he possessed competent authority to grant or refuse a clearance. And I apprehend where the law has left this discretion in an officer, the court agreeably to the British practice and precedents, ought not to interpose by way of mandamus.

Secondly. In this case there was a controlling power in the chief magistrate of the United States. There was in fact, an express appeal given to the president by the very words of the act of congress, which authorizes the collectors to detain vessels "until the decision of the president of the United States be had thereupon." By the mandamus the reference to the president is taken away; and the collector is commanded to clear the vessel without delay. Agreeably to the English authorities under such circumstances, it is not the course I believe to issue a mandamus.

Thirdly. The parties, it seems, had their legal remedy against the collector; and it is not usual if not unprecedented, to grant a mandamus in such a case.

Fourthly. A mandamus is not issued to a mere ministerial officer to compel him to his duty. The court will leave the parties to their remedy by action, or even by indictment. In England, in a very late case, they decided that they would not grant a mandamus to a ministerial officer, such as the treasurer of a county; for the proper remedy was by indictment.

I am aware of a precedent, in which it seems to be admitted, that a mandamus may issue to the commissioners of excise, to compel them in a proper case to grant a *permit*. This case is more analagous to the one now before us than any other I have been able to discover, after a diligent research. But in this instance the point was not made, nor the question argued. Besides, the commissioners of excise in England form a board for superintending the collection of that branch of the revenue. They constitute in many respects a court of inferior jurisdiction, which in particular cases takes cognizance in a summary way, of offenses against the excise laws. A mandamus might be granted to such a tribunal when it would not be issued to a mere

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ministerial officer, acting under them in the collection of the revenue.

It results from this view of the subject, that the mandamus, issued by the circuit court for the district of South Carolina was not warranted by any power vested in the circuit courts by statute, nor by any power necessarily incident to courts, nor countenanced by any analogy between the circuit courts, and the court of king's bench: the only court in that country possessing the power of issuing such writs. And it further appears, that even the court of king's bench, for the reasons assigned would not, agreeably to their practice and principles, have interfered in the present case by mandamus.

It might perhaps with propriety be added, that there does not appear in the constitution of the United States any thing which favors an indefinite extension of the jurisdiction of courts, over the ministerial officer within the executive department. On the contrary, the careful discrimination which is marked between the several departments should dictate great circumspection to each, in the exercise of powers having any relation to the other.

The courts are indubitably the source of legal redress for wrongs committed by ministerial officers; none of whom are above the law. This redress is to be administered by due and legal process in the ordinary way. For there appears to be a material and obvious distinction, between a course of proceeding which redresses a wrong committed by an executive officer, and an interposition by a mandatory writ, taking the executive authority out of the hands of the president, and prescribing the course, which he and the agents of any department must pursue. In one case the executive is left free to act in his proper sphere, but it is held to strict responsibility; in the other all responsibility is taken away; and he acts agreeably to judicial mandate. Writs of this kind if made applicable to officers indiscriminately, and acts purely ministerial and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department.

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If in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the president to take care that the laws be faithfully executed. I do not see any clear limitation to this doctrine, which would prevent the courts from compelling by mandamus all the executive officers—all subordinate to the president at least, whether charged with legal duties in the treasury or other department, to execute the same according to the opinion of the judiciary and contrary to that of the executive. And it is evident that the confusion arising will be greatly increased by the exercise of such a power by a number of separate courts of local jurisdiction, whose proceedings would have complete and final effect, without an opportunity of control by the supreme court. So many branches of the judiciary, acting within their respective districts, their courses might be different; and different rules of action might be prescribed for the citizens of the different states, instead of that unity of administration which the constitution meant to secure by placing the executive power for them all, in the same head.

What too becomes of the responsibility of the executive to the court of impeachment, and to the nation? Is he to remain responsible for acts done by command of another department? or is the nation to lose the security of that responsibility altogether? From these and other considerations, were this branch of the subject to be pursued, it might be inferred, that the constitution of the United States, by the distribution of the powers of our government to different departments, ascribing the executive duties to one, and the judiciary to another, controls any principles of the English law, which would authorize either to enter into the department of the other, to annul the powers of that other, and to assume the direction of its operations to itself.

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These remarks are respectively submitted to your consideration. They are made with due deference to the opinion of the court; with one of the judges constituting which, I am personally acquainted, and for whose character I feel the sincerest regard.

Yours very respectfully,

(Signed)

C. A. RODNEY.

The President of the United States.

July 15th 1808.

JUDGE JOHNSON'S REMARKS on the publication of the attorney general's letter to the president, on the subject of the *mandamus* issued by the circuit court of South Carolina to the collector, in the case of the Resource.

EDGEFIELD DISTRICT, 26th August, 1808.

In a Charleston paper, received by the last mail, I have perused a letter addressed by the attorney general of the United States to the president, relative to the proceedings of the circuit court of South Carolina, in the case of the Resource. That the president should have consulted that officer upon a legal subject, is perfectly consistent with the relation subsisting between their respective stations; and as long as the result of that consultation was confined to the cabinet, there had occurred nothing inconsistent with the relation between the executive and judicial departments. But when that opinion is published to the world, under the sanction of the president, an act so unprecedented in the history of executive conduct could be intended for no other purpose than to secure the public opinion on the side of the executive and in opposition to the judiciary. Under this impression I feel myself compelled, as the presiding judge of the court, whose decision is the subject of the attorney general's animadversions, to attempt a vindication of, or at least an apology for that decision. So long as its merits were the subject of mere newspaper discussion, I felt myself under no concern about the opinion that the public might form of it. The official acts of men in office are

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proper subjects for newspaper remarks. The opinion that cannot withstand a free and candid investigation must be erroneous. It is true that a judge may, without vanity, entertain a doubt of the competency of some of the *editors of newspapers* to discuss a difficult legal question; yet no editorial or anonymous animadversions, however they may have been characterized by illiberality or ignorance, should ever have induced me to intrude these observations upon the public. But when a bias is attempted to be given to public opinion by the overbearing influence of high office, and the reputation of ability and information, the ground is changed; and to be silent could only result from being borne down by weight of reasoning or awed by power. I should regret exceedingly should I err in attributing to the president the publication of the attorney general's letter. I do so because, from the nature of the case, it is impossible to think otherwise. There is no reason to suppose that the attorney general would have published it at all; or at least not without the command or permission of the president. That the attorney general should have formed conclusions differing from those of the court, is the most natural thing imaginable. It proceeds from the assumption of erroneous premises.

The writ of mandamus in a case analogous to that of the Resource is not provided for by law.

The collector had not an unlimited discretion in granting or refusing a clearance.

There was not a general appeal to the will of the chief magistrate.

Nor does the court found its right to issue the mandamus upon an analogy drawn from the courts of Great Britain.

Upon the affirmation of these propositions the opinion of the attorney general appears to be predicated. In addition to which he would seem to have misapprehended the purport of the decision of the supreme court, in the case of *Marbury v. The Secretary of the State*, and to have drawn reasons from inconvenience, which may prove a great deal

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too much for the public security; and which have already met with the disapprobation of the supreme court in the before mentioned case. A concise history of the case of the Resource is indispensably necessary in pursuing the subject.

In order to prevent evasions of the laws prohibiting foreign intercourse, congress found it necessary to grant certain powers to the collectors, by which they might detain vessels, clearing out for a port of the United States, when their real destination was to some foreign port or place. For this purpose was passed the following clause of the act of April 25th, of the present year.

Sec. 11. "And be it further enacted, that the collectors of the customs be and they are hereby respectively authorized to detain any vessel *ostensibly* bound with a cargo to some other port of the United States, whenever in their opinions, the intention is to violate and evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereon."

This clause, although from a superficial view it may seem otherwise, really authorizes no restraint whatever upon the commercial intercourse of the several states, or of any state within itself. It is not a vessel really bound from one port or place in the United States to another, that the collector is authorized to detain, for that is no violation of the embargo act; but those which are only *ostensibly* bound from one port to another, within the United States when *their real destination* is to some other port or place, or to do some act in violation of the laws imposing an embargo. I assume it as an incontestable proposition, that every inhabitant of the United States has a perfect right to carry on commerce from one port to another, unless restricted by law; that no officer of our government can legally restrict him in the exercise of that right, except in cases specified by law. I would as soon attempt to prove his right to the air that he breathes, or the food that he consumes, as to support these doctrines by a course of reasoning; nor is it less clear, that in all cases of uninterdicted commerce, the collector is

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bound to grant a clearance whenever the forms imposed by law have been complied with. It is the obligation on him correlative to the right of the citizen. Upon an attentive and candid perusal of the foregoing clause, (which is the only one upon this subject) it is impossible for the mind to refuse its assent to the following propositions:

1. That it gives no power to the president to order a detention in any case.

2. That it authorizes the collectors to detain in one specified case, and that only, viz. whenever, in *their opinion, the intention is to violate, and evade any of the acts laying an embargo.*

3. That the only case, in which the law authorizes the president to act upon the subject, is, when the collector having detained a vessel, a reference is made to the president for his decision on the correctness of the grounds of such detention.

4. That the discretion in granting clearances is absolute in the collector, in the first instance; and only results to the president in case of the collector's refusal. From which it will follow that the president could not prescribe to him a line of conduct in granting clearances which was inconsistent with his own judgment; and, in fact, it will be found that the only effect in granting the mandamus in the case of the Resource was to secure to the collector the exercise of the power vested in him by the foregoing section, and to the citizen the benefit of the collector's being released from a restraint which the law did not impose on him.

On the 6th May, 1808, the secretary of the treasury addressed to the collector of the port of Charleston the following letter:

SIR:—I informed you in my letter of the 28th ultimo, that the president considered unusual shipments, particularly of flour and other provisions, of lumber and of naval stores, as sufficient causes for the detention of the vessel. Pot and pearl ashes and flaxseed, ought to have been added

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to the list; but he has given it in charge to me, to call your attention still more forcibly to that object; as it was the great and leading object of the legislature in giving the power of detention, he considers it his duty, in the execution of it, to give complete effect to the embargo laws. He recommends therefore that every shipment of the above articles, for a place where they cannot be wanted for consumption, should be detained," etc., etc.

The Resource was one of a number of vessels that were loaded and waiting in the port of Charleston, to sail as soon as the embargo should be raised; her cargo consisted of rice and cotton. About the month of June, it is well known that in that port the worm is peculiarly destructive to vessels' bottoms. This induced the merchants generally, about that time, to adopt the resolution to dispatch their vessels to some northern port, where they might escape the ravages of this destructive insect. Upon the collector's refusing to grant a clearance to any vessel, the cargo of which consisted in any part, however small, of provisions (pursuing the strict letter of his instructions) application was made to the court for a mandamus, on an affidavit stating the above facts; and a rule was granted without opposition. Upon the return of the rule the collector expressly declared that, in his opinion, the Resource had no intention to violate or evade any of the provisions of the acts laying an embargo, but urged the secretary of the treasury's letter to him, as the sole ground of his refusal to grant a clearance. It is easy to perceive the embarrassment into which this officer was thrown. On the one hand, he must have been sensible of the impropriety of detaining a vessel on pretense of a suspicion which he did not and could not entertain; that the wanton and injurious exercise of even a legal discretion would subject him to damages; and that the amount, to which he must render himself liable in this case, was infinitely beyond anything he was able to pay; as the merchants threatened to throw their vessels upon his hands. He may also have felt that sentiment of injury which affects the

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mind of every one upon the undue restriction of the exercise of his own faculties. But on the other hand, as he held his office absolutely at the will of the executive, acquiescence was necessary; although ruin threatened him, and no prospects of indemnity could possibly present themselves. In this situation he made his statement of the foregoing circumstances, and submitted the case to the court, through the district attorney, without argument. Upon the return of the rule, the court particularly called upon the United States attorney, to say if he contested the power of the court to proceed by way of mandamus in the case before them. He replied that he could make no objection. The high respect in which that gentleman's talents and information are held would be at least an apology for any court's proceeding in that mode, upon his acquiescence. Under these circumstances, when every point was conceded, except whether the instructions of the president could authorize a detention in a case not comprised within the law of congress, the court did not, could not hesitate to decide that, to detain a vessel, because, in his opinion, her intention was to evade the embargo laws, when he avowed his opinion to be otherwise, was an absurdity in terms; that if the act of congress did not authorize the detention of the vessel, the instructions of the president could not sanction it; and as the remedy by an action for damages was very inadequate to the full vindication of the rights of the petitioner, a mandamus should issue. The court went further, and observed that the instructions, upon which the collector relied, did not appear to have been intended to reach the case before them; and if they did, they were only in the language of recommendation and not of command; so as to leave the collector still at liberty to exercise that discretion which the law had given him. But in these latter remarks, there is every reason to think that they misapprehended the intention of the executive; as the publication of Mr. Rodney's letter may be viewed as a full avowal that the case of the *Resource* was contemplated by the executive; and that a recommendation was expected to operate

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upon the dependent situation of the collector with the weight of a command. From which it would result, that every power, given to an officer removable at the will of the executive, is given to the executive.

In pursuing my remarks on the attorney general's letter, I feel an embarrassment, resulting from what I hope he will excuse me for denominating a want of precision of language. Jurisdiction in a case is one thing: the mode of exercising that jurisdiction is quite another. That the court possessed jurisdiction over the case between the parties before them, is admitted by the attorney general, when he supposes that the owner of the Resource may have maintained his action against the collector for an illegal detention. The language of his tenth paragraph supposes a total and absolute defect of jurisdiction; while that of some of the paragraphs preceding it seems to imply that the impropriety lay in the mode of process by which the court exercised that jurisdiction. To avoid, however, all ambiguity and the charge of misapprehension or misstatement of the argument, I will direct my observations to three points, which must embrace the whole subject:

1. The jurisdiction of the circuit court.
2. The power of that court to issue the mandamus, in the exercise of that jurisdiction.
3. The propriety of issuing it in the case of the Resource.

The jurisdiction of the court, as is properly observed by the attorney general, must depend upon the constitution and laws of the United States. We disclaim all pretensions to any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench. That judicial power, which the constitution vests in the United States, and the United States in its courts, is all that its courts pretend to exercise. In the constitution it is laid down, that "the judicial power of the United States shall extend to all cases in law or equity, arising under this constitution and laws of the United States, and treaties made, or which shall be made," etc.

The terms judicial power convey the idea, both of exer-

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cising the faculty of judging and of applying physical force to give effect to a decision. The term power could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution. But to what purpose establish a judiciary, with power to take cognizance of certain questions of right, but not power to afford such redress as the case evidently requires? Suppose congress had vested in the circuit court a certain jurisdiction, without prescribing by what forms that jurisdiction should be exercised; would it not follow that the court must itself adopt a mode of proceeding adapted to the exigency of each case? It must do so, or refuse to act. One thing, at least, cannot be denied: that the power of congress was competent to authorize the circuit court to issue the writ of mandamus. From this it would follow, that issuing that writ is a mere incident to the judicial power, and not in itself a distinct branch of jurisdiction; for the constitution no where expressly vests in the United States the power to issue that writ, or any other. And if a mere incident, I see no reason why it should not follow with the principal jurisdiction, when vested by congress in its courts. If it were necessary to appeal to analogy, to justify any exercise of jurisdiction, it would be easy to show that the supreme court of the United States bears a stronger analogy to the court of exchequer, or that of parliament, than the court of king's bench; and that if there exist any analogy between any of the courts of the United States and those of Great Britain, it is between the court of king's bench and the latter, and the circuit court of the former government; the union of

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criminal and civil, and of original and appellate jurisdiction, marks the similarity of the latter. But it is wholly unnecessary to recur to any other authority than what is given us by the constitution and laws of the United States, as the constitution defines in what cases, and between what description of persons our courts may exercise jurisdiction; and the form or mode of process is sufficiently settled by acts of congress. That description of cases, under which the present must be arranged, is, cases arising under the laws of the United States. If it be a question of right arising under the laws of the United States, it is one of those to which the judicial power of the United States extends, and for which they were bound to administer a remedy; not one that would mock the hopes and just expectations of the individual, but an adequate and efficient remedy. I deem it unnecessary to enter into a critical examination of the acts of congress on the question, whether jurisdiction in cases arising under the laws of the United States is delegated to the circuit courts. The inveterate exercise of that jurisdiction under the sanction of the supreme court is the authority I appeal to.

2. In considering the power of the court to issue the writ of mandamus in the exercise of its jurisdiction, the attorney general cannot demand greater fairness than to be met on his own principles. His argument is, that the power given to the circuit court relative to the issuing of writs (except as to two particularly named) extends only to writs not specially provided for by law. That the power to issue the writ of mandamus is by law vested in the supreme court, and therefore is provided for by law. Here nothing but my frequent experience of that gentleman's habitual candor, prevents me from charging him with unfairness; or perhaps he really misapprehended the purport of the decision of the supreme court in the case of *Marbury v. The Secretary of State*; as upon no other suppositions could he have used this argument. In that case the court did not decide, as the attorney general seems to suppose, that issuing a mandamus was an exercise of jurisdiction not within the

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scope of the judicial powers of the United States. On the contrary, they expressly declare the power and the propriety of the courts issuing it in many cases which may occur. But in cases where a foreign minister or a state is a party, the supreme court is restricted to the exercise of an *appellate* jurisdiction; and its decision was, that the act of congress, so far as it was intended to vest that court with power to issue the writ of mandamus in a case partaking of the nature of *original jurisdiction*, was unconstitutional and void. A void law I presume is no law; and it would follow therefore that the writ of mandamus, in those cases of original jurisdiction, which cannot constitutionally be submitted to the supreme court, comes fully within the description of a writ not otherwise provided for by law. Certain it is that if the circuit court of this state could not issue this writ in the case of the Resource, there was no legal provision by which the benefit of it could have been extended to her owner. The supreme court could never have exercised jurisdiction over the question of right between the parties in that case except upon appeal. Whatever suit or action was proper on the occasion, was by the constitution confined to the other tribunals in the first instance. But the right of the court to issue this writ does not wholly rest here. There is another act in force (although not to be found in Graydon's Digest) which appeared to authorize, nay to oblige us to issue the writ of mandamus. The act of congress, commonly called the process law, enjoins on the courts of the United States to conform their practice to that of the several states in which they sit. I am aware that in technical language the term *process* (which is the word used in that law) includes only those acts which take place between the institution and conclusion of an action. But whosoever peruses this act, will find on the face of it strong reasons for indulging it with a construction conforming to the vulgar use of the term *process*. In fact it affords incontestable evidence that the legislature understood the term *process*, as embracing the whole scope of judicial proceedings. The title of the act is,

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"an act to regulate judicial process in the courts of the United States ;" and the first line of it mentions writs as a proceeding included under this general head. Executions also are objects of the act, as well as proceedings in the equity and admiralty courts. The correct, legal and received construction of this act therefore is, that the forms and modes of administering justice, the remedies to be applied to the rights which are committed to our jurisdiction shall be such as are used and allowed in the supreme courts of the states over which we respectively preside. Now I do assert (and my opportunities of information on this subject will justify my pretending to some authority) that in a case analogous to that of the *Resource*, the mode of proceeding in the state courts of South Carolina is by mandamus. Thus then stood the case: The owner of the *Resource* had an unquestionable right to a clearance: a right which is acknowledged by the collector himself (and not even denied by the attorney general.) He applies to the court to vindicate this right. That he was entitled to redress could not be doubted. In what form was that redress to be administered? The process law directs our inquiries to the practice of the state of South Carolina. By the practice of that state, the process is by mandamus. It is said, the party may have been left to his action for damages; but would this have been putting him in possession of his right? It would have been an arbitrary substitution of a compensation instead of his right; and both in practice and theory would not have amounted to complete justice. There are rights which perish in the violation. These will admit of no other remedy; nor will the law allow any other redress for the acts of mere individuals. But for rights which continue to exist, notwithstanding their violation, and the violation of which is committed under semblance of sovereign authority, the dignity of the government, as well as the security of the citizens, requires an additional remedy. If in the construction of the act last noticed, it should be thought that I have given it a latitude not intended by the legislature, my reply is, that I can dis-

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cover no other construction that will not totally annihilate its operation. The act prescribes certain terms and modes of process; but it would be as rational to suppose the existence of form without substance, as that these forms and modes of process could be adopted without relation to the cases in which they are known and practised in the several states. Should the want of technical precision in these acts have involved the court in error, the reply is, that the introduction of philological correctness into our laws at some stage of their progress would save the courts much trouble and much odium. This might be done before they pass from the hands of the executive.

8d. In considering the third and last question, viz. the propriety of issuing a mandamus in the case of the Resource, it will be found that the four grounds of the attorney general admit of a brief and very satisfactory answer.

The first is, "that the law gave the collector complete discretion over the subject." The fact is otherwise. The discretion of the collector was limited to a particular case: that of his entertaining suspicion which he himself admits could not be entertained with regard to the Resource. Or it may be answered thus: the instructions of the executive deprived him of that discretion. The mandate of the court obliged him to act according to the dictates of his own judgment, to which the law of congress had committed the interest of his fellow citizens, and not surrender a right of judging which must ever be entirely personal; and which we can never know by what motive congress may have been influenced in vesting in him, instead of any other officer of government.

The second argument is, "that there was a controlling power in the chief magistrate of the United States." This is equally incorrect in the extent in which it has been laid down, and in which alone it would answer the purpose of the attorney general. The fact is, as has been before shown, that the power of the president to act upon the subject was confined to the particular case of a reference to him upon

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a previous detention by the collector; and did not authorize the president to prescribe to the collector in what cases he should detain. In cases where the collector had detained upon suspicion, on the dictates of his own judgment, the president could oblige him to discharge, but was not authorized to control him generally, in the exercise of the right of granting clearances in the first instance. Nothing was easier than for congress to have declared that the president should dictate generally to the collector upon this subject, if such had been their intention. This would have been giving the executive that latitude of power which was necessary to justify their instructions to the collector, but which cannot be extorted from the law under which they acted.

With regard to the third argument, "that the parties had their legal remedy against the collector," I can assure the attorney general that it is both usual and precedented for courts to issue the writ of mandamus notwithstanding that circumstance, when that remedy is not adequate to the ends of justice and good government. In some cases, to save a party the necessity of pursuing a remedy in equity, or a remedy in its nature too tedious, this writ has been issued. The case of the commissioners of excise in 2 Term Rep. of which the attorney general is aware (and with his own answer to which I think I perceive that he is not satisfied) might have convinced him that this argument could not be relied on; for there also the action for damages might have been maintained. The total inadequacy of this action to the ends of justice in this case will be strikingly perceived if we reflect on the impossibility of finding any criterion by which to estimate the loss consequent upon the disappointment of a mercantile adventure, and how very incompetent the collector must individually have been to discharge the immense amount of damages which might have been awarded against him; especially as individuals could derive no indemnity from his bond to the government. Indeed the action for damages is, at best, but a poor dependence and but a substitute for more ample justice.

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The fourth and last ground relied on by the attorney general is, that the courts of Great Britain will not issue a mandamus to a mere ministerial officer, such as a county treasurer to compel him to a discharge of duty. This was the case of *The King v. Brestow*, reported in 6 Term Rep.; but surely in order to point the argument founded on this case it was incumbent on the attorney general to have shown what analogy exists between two officers of the county treasurer and collector of the port of Charleston; and as the reason of the decision in *The King v. Brestow* was that the treasurer was punishable by indictment, it would seem that it should be shown by what authority this court could have proceeded against the collector in a similar manner. Had such a power existed in the court it would still have been a farce to institute a prosecution for an offense which the president could and most certainly would have pardoned even before conviction.

That an office is merely ministerial, is in fact no objection to the issuing of a mandamus; nor is it made, so far as I can recollect, (for I have not the case before me) in *The King v. Brestow*. It would be difficult to find a reason why, if the court can issue this process at all against public officers, it should not compel them to do justice to the citizens in a ministerial as well as a judicial capacity. In cases of direct subordination or accountability to some specified jurisdiction, the court will not interpose the authority of this writ. That circumstance removes the necessity for lending its aid; and it is against the officer of government that it issues, not against the mere agent of that officer, whose acts are the acts of his principal.

As the attorney general lays much stress on the idea of the collector's being a mere ministerial officer, it is to be regretted that this argument was not attended with some analysis or exposition of that term. I know of no precise technical signification attached to the word ministerial, except in contradistinction to judicial. In its ordinary meaning it is rendered attendant, acting at command, acting under superior authority. In neither of these senses is it

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properly applicable to the office of collector. His functions are among the most important exercised by any officer of the United States, and call for the frequent exercise of his own will, judgment and discretion. He is at least as far from being merely ministerial, as the commissioners of excise. If the office of the collector be merely ministerial (in the sense in which the attorney general appears to use the term) he must be the officer of the president or the treasury department, and not of the United States. The president or secretary of the treasury must be individually and personally responsible for his civil acts. But the contrary is abundantly evident; for his duties are immediately assigned him by law. According to a just construction of that law, he must frame his conduct; and no instructions from the president or secretary of the treasury, (although founded on the attorney general's opinion) can be pleaded by him in justification, except in the single instance of an action on his own bond by the government. At least, so far as his duties are assigned him by law, and not left to be assigned him by the treasury or executive department, his office is not merely ministerial. Some other observations of the attorney general remain to be noticed, viz., that in giving redress by the process of mandamus, the courts may extend their claim to jurisdiction, to a general usurpation of power over the ministerial officers in the executive department; that it is a mode of proceeding which takes away from the government the benefit of appeal, and interferes with the responsibility to which officers of government are subject by impeachment. With regard to the first of these observations, it is evident that the attorney-general mistakes the object against which his complaint should be directed. The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States. Of these laws the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted. It is

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against the law, therefore, and not the courts, that the executive should urge the charge of usurpation and restraint: a restraint which may at times be productive of inconveniences, but which is certainly very consistent with the nature of our government: one which it is very possible the president may have deserved the plaudits of his country for having transcended, in ordering detentions not within the embargo acts, but which notwithstanding it is the duty of our courts to encounter the odium of imposing. Let us take this argument together with that which relates to the liability of officers to impeachment, and some others which are used by the attorney general, into one view; and to what conclusions do they lead us? The president is liable to impeachment; he is therefore not to be restrained by the courts. The collector (and every other officer with equal propriety, who holds his office at the will of the president) are his agents, mere ministers of his will; therefore they are not to be restrained by the process of the courts. The power given to them is power given to him; in subordination to his will they must exercise it. He is charged with the general execution of the laws; and the security of the citizen lies in his liability to impeachment, or in an action for damages against the collector. This would indeed be an improvement on presidential patronage. It would be organizing a band, which in the hands of an unprincipled and intrepid president (and we may have the misfortune to see such a one elevated to that post) could be directed with an effect, but once paralleled in history. If these arguments have any force at all, as directed against the correctness of the circuit court's issuing the writ of mandamus, they would have equal weight to prove the impropriety of permitting them to issue the writ of habeas corpus; which is but an analogous protection to another class of individual rights, and might be urged to show that the whole executive department, in all its ramifications, civil, military and naval, should be left absolutely at large, in their conduct to individuals. What benefit results to the ruined citizen from the impeachment of the president,

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could we suppose it in the power of any individual to effect it? or what security from an action against a public officer whose circumstances may be desperate? But such is not the genius of our constitution. The law assigns every one his duty and his rights; and for enforcing the one and maintaining the other, courts of justice are instituted.

When a late president took upon him to advise and request an officer of the United States to do an act relating to foreign intercourse, which the people of the United States thought ought to have been left to that officer's own judgment, it is well remembered what a general sensation it excited; yet the general duty of the executive, to superintend the foreign intercourse of the United States, was just as strong a reason to induce the president to think himself authorized to dictate, or at least advise in that case, as the general duty to see the laws executed was in this.

The argument drawn from the liability of the officers of government to impeachment, I cannot help thinking unhappily applied in another view. If an officer attempt an act inconsistent with the duties of his station, it is presumed that the failure of the attempt would not exempt him from liability to impeachment. Should a president head a conspiracy for the usurpation of absolute power, it is hoped that no one will contend that defeating his machinations would restore him to innocence. If, in the present instance, the owner of the *Resource* had been ordered to be hanged, instead of ordering his vessel to be detained, and the courts of this district had rescued him from executive power, it is presumed that the attorney general would not contend, that the liability to impeachment was done away; although he would find no difficulty in showing that it was a case analogous to that of the *mandamus*: of the violation of that careful discrimination which is marked between the several departments by the constitution.

The objection, "that this mode of proceeding takes away the right of appeal," is but slightly touched upon by the attorney general; and probably, because, in revolving the

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subject, he perceived that it is no objection to the exercise of jurisdiction in the circuit courts of the United States, that there is no appeal from their decisions; as they actually possess and exercise a very extensive jurisdiction without appeal. If congress thought proper, they could prescribe a form of appeal from those courts to a higher tribunal in cases of mandamus, habeas corpus, injunction in equity, or any other summary remedy. I do not know that they could, constitutionally, vest this appellate jurisdiction in the attorney general; but they certainly could in the supreme court. Some may think that this complaint, of the loss of the right of appeal, might more properly have been heard from another quarter. Congress thought that they had given the merchant the security of an appeal in case of unreasonable detention by the collector. But this benefit must, at least, have been impaired when the court to which that appeal was given, not only prejudicated every case, but on the ground of its appellate jurisdiction, swallowed up the power of the court of the first resort.

I will dismiss this subject with two additional remarks. The courts of the United States never have laid claim to a controlling power over officers vested by law with an absolute discretion, not inconsistent with the constitution; for in such a case, the officer is himself the paramount judge and arbiter of his own actions. Nor would they, for the same reason, undertake to control the acts of an officer who is a mere agent of the executive or any other department, in the performance of whatever may be constitutionally, and is by law, submitted to the discretion of that department; for in that case, the process of the court should be directed to the head of the department, or it should not issue at all. In such cases there is an evident propriety in leaving an injured individual to his action for damages; as it is only upon evidence of express malice or daring disregard to propriety, that this action could be maintained. In such a case, the authority to act is complete; but the motive is censurable. The courts will not interfere to prevent the act; because the law authorizes it. But as the law did

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not authorize it for individual oppression, they will give damages to the individual who suffers by the wanton exercise of a legal power. This subject was very fully considered in the case of *Marbury v. The Secretary of State*; and to pursue it further, I should do little more than repeat the words of the court in that case. The discrimination between the cases in which a mandamus might, and might not issue to the secretary of state, will point out to those who consider it, the limitation to this doctrine in the idea of the judiciary.

2. Had the collector, in his return to the rule of court, made a question of their jurisdiction, the grounds upon which the court assumed it, would have been before the public; and the attorney general would not have had to pass an opinion upon a decision, with the grounds of which he was unacquainted; or, had the collector merely set forth the act of congress, and declared that it was in pursuance of that law, that he caused the detention of the ship in question, the court must have refused the mandamus, because he would then have claimed that exercise of discretion which the law vested in him; and as he was accountable only to the president for his motives, there would have been no difficulty, by due management between those officers, to have eluded the process of the court. With this mode of managing a difficult affair, the collector was not totally unacquainted; for something similar to it had been done in the case of Bollman the winter preceding. This quiet submission to judicial decision in the first instance had for its object the obtention of a legal sanction for the collector's acquiescence in the recent measures of the executive, or a legal exemption from it. Either way the judiciary had to encounter responsibility and censure. It is very possible that the court may have erred in their decision. It is enough, however, and all that a judge, who has understanding enough to be conscious of his own fallibility, can pretend to, that there existed grounds at least specious for the issuing of the mandamus. Though the laws had not vested the power, the submission of the offi-

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cers of government would, at least, excuse the act of the court. There never existed a stronger case for calling forth the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty. Indeed there is one remark relative to the attorney general's letter, which cannot have escaped the notice of the most superficial observer. The principal question, that on which it would seem that the executive was most interested to secure the public approbation, viz. the legality of the instructions given to the collector, is completely put aside; while the public attention is fixed upon another more abstruse and admitting of a greater variety of opinion. It may be possible to prove the court wrong in interposing its authority; but certainly establishing the point of their want of jurisdiction will not prove the legality of the instructions given to the collector. The argument is not that the executive have done right, but that the judiciary had no power to prevent their doing wrong. I cannot conclude without noticing the very obliging manner in which the attorney general concludes his letter. I hope he is sensible what a distinguished place he possesses in the esteem of that individual of the judges of this circuit, with whom he is personally acquainted. It is not the giving of his opinion, which has called forth this reply, but the publication of it.

These remarks have been withheld from the press for several weeks, from no cause but the extreme repugnance that I feel at agitating, in this manner, a question which I am sensible might, with much more dignity and relative delicacy, have been disposed of in another mode.

District Court of Maryland. 1808.

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*Under the act of congress for the government and regulation of mariners, shipping articles which provide "for a voyage from Baltimore to Curaçoa and elsewhere" do not authorize a voyage to St. Domingo direct; the words "and elsewhere" being properly construed in the conjunctive as subordinate to the principal voyage, and not in the disjunctive as authorizing an entirely different voyage from the one designated in the article.

WINCHESTER, J. In this case the libellant claims wages for services rendered in a voyage from Baltimore to St. Domingo, and back, and alleges that the voyage which he stipulated to perform was from Baltimore to Curaçoa and back, and not to St. Domingo where the vessel did go contrary not only to the articles, but the express understanding of the parties, and the declaration of the libellant, that he would not ship on a voyage for St. Domingo. The articles exhibited specify a voyage to Curaçoa and elsewhere; and under the latitude of the last general words the respondent contends that he was authorized to go to St. Domingo, without proceeding to Curaçoa.

Taking the fact alleged to be true, that the voyage in view and actually prosecuted, was from its commencement for St. Domingo and not the port of Curaçoa; the objection to pay the libellant's wages comes with a very ill grace from the respondent, who shows and rests on his own deception and breach of faith as the foundation of his defense; and the court would reluctantly discover any rule of law so imperative as to compel the sustenance of such a justification.

The act for the government and regulation of mariners contemplates two species of contract between owners and seamen. 1. For a voyage or voyages. 2. For a term or terms of time. The latter is undoubtedly the proper form

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of articles where the destination of a vessel cannot be specifically known, and where the vessel is employed on what is called a trading voyage, or is in search of freight. The first, to wit, that in which the voyage or voyages are specified, applies to designated ports, or particular kinds of voyages known and understood to be governed in their extent and duration.

The term "voyage," like the term "voyage assured," is a technical phrase, and always imports a definite commencement and end. *Nomen loci ubi navis oneratur et nomen loci quo navis tendit.* The voyage from Baltimore to Curaçoa is therefore a specified voyage, the labor and hazard of which is known to all parties; and for that voyage the agreement is such as the statute requires. But the terms "and elsewhere" are added to this specification of voyage, and it is insisted by the respondent's counsel, that under these words he was authorized not only to invert the order of voyage specified in the articles, but to go to any other port, as to St. Domingo.

If this construction was sound, the provisions of the act of congress, which require a specification of the voyage, when the hiring of seamen is not for a given time, become a dead letter; because there would be no *terminus ad quem*, which is essentially necessary to the legal sense of the term "voyage." The terms "and elsewhere" must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or in other words, to import no more than the law would imply as incidental to the main contract. All arguments which rested on the defendant's right to construe these articles as giving him the alternative of several ports, must fail of course. Indeed there is nothing in the words of the contract which, independently of the ground before taken, would warrant, by rules of law or grammatical construction, such an interpretation. The term *and* is properly conjunctive; and is never construed to be disjunctive unless when coupled with a manifest intent apparent upon the writing itself, that it was

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used in such sense and for such purposes by the parties. The only intent manifested upon the face of the articles before the court, is such as is fairly to be understood by the words from Baltimore to Curaçoa *and* elsewhere; and it would be doing very great violence to these words to invert the order of ports; for if the respondent is once exempt from the necessity of proceeding to Curaçoa, the specified voyage, there is nothing which would restrain his entering upon the most remote and perilous voyage the adventurous and enterprising spirit of commerce could suggest. I do not wish to be understood as giving any opinion, that it is essential to the validity of seamen's articles, that there should be an insertion of the name of every port to which a vessel may proceed in the course of trade; but that there must be some equivalent specification, such as to a port or ports, island or islands in the West Indies, or to the Mediterranean, or the like. The legal termination of such a voyage is ascertained by the most solemn decisions and able opinions.

But for a moment let us adopt the construction of the respondent's counsel, and admit the words "and elsewhere" to be understood in the alternative, as wished by the respondent, and apply the same rule in favor of the libellants. The clause in the articles runs thus: "We the undersigned have shipped as mariners on board the schooner master, for a voyage from the port of Baltimore to the port of Curaçoa and elsewhere, at the monthly wages, &c." Admit that the respondent was not bound to proceed on the voyage to Curaçoa by reason of the words *and elsewhere*, which shall be construed to give him an election to go to St. Domingo. The right then is commensurate with the whole case, and considering the word *and* in its disjunctive character and importing the same as *or*, it must be construed throughout as a disjunctive; and the articles must then be read thus, for a voyage from Baltimore or elsewhere, to Curaçoa or elsewhere; for the port of Baltimore is not more positively described as the port of departure, than Curaçoa is as a port of destination. The term

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voyage is the antecedent to which the disjunctive relates. It would then be open to the libellants to argue and prove that he did not mean to sail from Baltimore but another port, as New York for instance, and not to Curaçoa but Cuba. This would be opening the door to all dangers and inconveniences so wisely guarded against by the act of congress, which requires an insertion of the voyage or voyages contemplated.

And I would put it to the consideration of the respondent's counsel, whether, (supposing there was no rule of law binding in this case, and it rested upon the sound discretion of the court, and considering the characters who usually foment and conduct disputes in favor of seamen, and the character of the witnesses frequently produced to establish their claims when resting wholly on parol evidence,) the interest of merchants and ship-owners and public morals as well as private justice will not be more effectually subserved, promoted and secured, by the rule I have taken, than the one for which he has argued.

It was decided by my predecessor, that the words "and elsewhere," annexed to a specified voyage, did authorize the proceeding to one other port, but still that the ports must be proceeded to in the order of their specification. I never was satisfied with the first part of that opinion, as I have often incidentally mentioned, but the point has never been directly brought before me until in this case. I have long combated with my impressions on this question; but on the fullest consideration, I do hold myself bound to declare, that the words "and elsewhere," used as they are in this case, cannot authorize a new voyage, unless such an intent is fairly deducible from some relative expression, and that their true construction is subordinate to the principal voyage. It is due to the memory of Judge Paca, as well as myself, to state briefly the reasons of my opinion.

It has been argued, that these articles are to receive such a construction as will comport with the usual course of the West India trade; which is stated to be, to seek the best market without regard to the particular ports specified. I

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do not know whether such be the usage, nor is it material to inquire, for as applied to the construction of a written contract, and to control legal rights, it is at direct war with every principle of law and policy. The argument from the admission of evidence to explain the course of a voyage does not justify the inference analogically drawn by the respondent's counsel. The duty of a captain is to proceed in the usual route of the voyage to his place of destination. There is a plain distinction between the voyage itself and the route of the voyage. The voyage is characterized by its *termini*. No evidence is admissible in any case to substitute other *termini*: but of two routes, it is lawful to show that either is equally safe and common. *Distinquitur iter a viaggio*.

In the case before the court, the voyage, for which the seamen shipped, never had any commencement. The vessel sailed direct for St. Domingo, and not for Curaçoa.

In 2 Emerigon, 84, 85, the construction of these general and indefinite clauses is ably investigated, and unless I had found myself supported by very respectable authority, the decision of Judge Paca would have been adhered to by me until reversed by a superior court. This respectable author declares that these vague and indeterminate clauses are to be interpreted by the principal object spoken of, and in case of doubt are to be understood relatively to law and the usages of commerce.

Thus an insurance for time, with permission to trade wherever the captain shall think fit, does not protect against a loss occasioned by smuggling. The assurers answer for no loss arising from the fault of the assured, although smuggling in a foreign court is not considered a crime or legal fault. These clauses, however general in their wording, are always expounded according to good faith, and admit neither of fraud nor surprise; *generaliter probandum est, ubicumque in bona fide judicis confertur in arbitrium domini vel procuratoris ejus, conditio; pro boni viri arbitrio hoc habendum esse.**

* A very important decision has taken place in England before the hon-

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In the opinion of the court, the words of the statute "what port, harbor or creek," were considered very express and equivalent to licensing for a voyage.

If this determination does not exactly run on all fours with the case to be decided, its principles are so nearly similar as to render an accurate discrimination very difficult, if not impossible. The voyage or voyages for which seamen ship are required by the statute to be specified in their articles. The term voyage imports navigation from one port to another, and perhaps, if not otherwise expressed, back again. In the plural it imports, a commencing at more than one port, or in other words, at several specified places. The commencement and termination of a voyage or voyages are ascertained by the ports or harbors from and to which a vessel is destined. The terms, "to trade along the coast," or "to every port, harbor or creek," include all the ports, harbors and creeks of a nation, in which a vessel is licensed for coasting trade. But it is not a compliance with a statute which enjoins that the particular ports shall be inserted. To require the insertion of the voyage, is neither more nor less than the insertion of the ports or harbors from and to which the vessel navigates. Of consequence, the unqualified term "elsewhere," applied to a specified voyage, is not designatory of any port or place, nor is it relative to any voyage in the legal sense of the term; it has no specific relation to any port or place whatever; and to apply it to all ports or places in the world would be as inconsistent with justice, as it would be unauthorized by law.

This decision is not different from old determinations. The rules, which apply to a right to a private way at land,

orable Chief Justice, Baron Eyre, on the construction of the tenth sect. of the stat. 24 Geo. 3, c. 47, (1 Anstr., 23,) regulating the coasting trade, and licensing vessels, and providing that such license shall specify the tonnage, etc. of the vessel licensed, and for what port, harbor or creek, she is about to sail. A license was granted, "to be employed in the coasting trade," generally. In support of this license it was argued that it meant to include all the ports in England, which is the same thing as if it specified every one; and it was agreed that such was the common form of licenses to coasters.

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cannot materially vary from those which are applicable to a contract for service in a voyage at sea. A prescription for a way is not good if it does not say *a quo termino ad quem* the way goes. Resolved Yel., 164, and this not indefinitely but certainly, 2 Lev., 10. As from A to a rectory, the *terminus ad quem* is uncertain, for the rectory consists of glebe, tithe, parsonage, etc.

So, that he is seised of B and has a way through the close of the plaintiff to the Thames, for he ought to say that he has a way from B through the close, etc., to the Thames. Mod. Cas., 3.

If this case should still be considered doubtful, let the argument *ab inconvenienti* be applied, and what will be the result? The construction I have adopted can never produce inconvenience to the ship owner, since in almost every case he does order the route and destination of her voyage previous to her departure; and it is easy and just to make his agreement with the seamen conform to such orders. If there is a discretionary authority confided to the captain to proceed to other ports, such authority will at least be limited by some bounds; and the articles should be drawn to meet such an alternative voyage, and to conform to the real object of the owner; and this object, so far as the rate and wages would be influenced by it, ought to be communicated to the sailors; or if it is not thought expedient to do so, they should be hired for a term or terms of time, as authorized by the act of congress. While the ship-owners are thus fairly secured against inconvenience, no more than justice is secured to the seamen. Adopt a different rule, and they may unjustly be entrapped into voyages of greater length, more hazard, peril and labor, and of course for which they ought to receive greater wages and greater advance; and of which increased compensation they would be deprived under such general words, too often improperly and most frequently thoughtlessly introduced into their articles.

The considerations of policy and the general rules of law, before stated, have great weight with me. Indeed I think

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it more desirable, that the principles of mercantile law should be referred to general axioms, than to the unbending authority of particular decisions: and it is therefore my custom not to refer so much to cases or opinions, as to universal principles. But on this occasion I shall add the weight of some opinions from a source to which we resort habitually for our judicial direction.

It is stated by Parke (title Deviation) "that it is necessary to insert, in every policy of insurance, the place of the ship's departure and also of her destination;" and in a preceding part of his work, page 23, ed. 1787, when referring to the same rule, he remarks, "this has always been held to be necessary in policies, at least for upwards of two hundred years; and must be so, on account of the evident uncertainty which would follow from a contrary practice, as the insurer would never know what the risk was he had undertaken to insure."

Molloy 6, 2, c. 7, § 14, has laid down this doctrine, that if a ship be insured from London to (a blank being left by the lader of the goods to prevent her surprise by an enemy,) if she happen to be cast away, though there be private instructions for her port, yet the insured must sit down with his loss, by reason of the uncertainty." "Such also," says Parke, "is now the law and usage of merchants."

These opinions and principles are supported by the determination in *Lavabre v. Walter*, Douglas, 271, in which the voyage insured was described in these words, "at and from port l'Orient to Pondicherry, Madras and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch, in the outward and homeward bound voyage, at the isles of France and Bourbon, and at all or any other ports or places whatsoever; and it shall be lawful for the said ship in this voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side the Cape of Good Hope, without being deemed a deviation." The ship went to Pondicherry, whence she went to Bengal, back to Pondicherry and sailed thence for, and was captured on her

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return to l'Orient. Both going and returning she either touched at, or lay off Madras, Masulipatam, Visigapatam and Yanon, and took in goods at all those places. This was held to be a deviation. This case is also very accurately reported in Emerigon, who remarks on the policy, "that however general the words of the policy were, they could not be construed more largely than the specified voyage, which was for Pondicherry, Madras and China."

These cases apply to the construction of the loose and indeterminate clauses of maritime contracts; and when fairly investigated will be found no more than a correct application of old and well established rules drawn from Roccus, Stympantus and Le Guidon le Mer to modern cases.

But the case of *Wooldridge v. Boydell*, Doug., 16, more immediately resembles the case now before the court in its facts and circumstances than any I have referred to. See Park, 260, S. C.

Circuit Court of Maryland, May Term, 1812.

JONES v. BUCHANAN.

- *1. Under shipping articles providing for "a voyage to commence at Baltimore and proceed to Batavia; thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore," an extension of the voyage to Japan was authorized.
2. Nor was such a voyage a violation of the rights of neutrals in the war then prevailing; and a condemnation under the English Orders in Council was contrary to the law of nations and not binding on neutrals.

LIBEL for seamen's wages.

The libellants were shipped in December, 1807, on board

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the ship *Rebecca*, for a voyage from Baltimore to Batavia, and thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore. On the 18th of May, 1808, the vessel arrived at Batavia, and completed her unloading 3d June. On the 27th April, 1809, she sailed thence for Japan, in the employment of the Dutch government. On the 24th May she was captured by the British and sent to Bombay, where she was condemned, on the 3d January, 1810, as being Dutch property, and as infringing the orders in council, for the prevention of trade in enemies' ports. (7th Jan., 11th Nov.)

There were three descriptions of claimants. 1st. The administrators of seamen who died at Batavia. 2d. Those who died after leaving Japan and before the capture. 3d. Those who returned to Baltimore.

For the Libellants.—It is true that where a voyage is broken up the seamen lose their wages; but this is a principle of law which should apply to them with as little rigor as possible. When a voyage is divisible into many parts, the seamen are entitled to each part as soon as it is performed. That part is an entire voyage, though a loss may happen afterwards. This is a mitigation of the former rule, by which seamen were made insurers of the voyage. In contracts of freight, if the charterer does any act by which the goods or vessel are lost, he must nevertheless pay the whole freight. So in insurance, if a deviation be committed, the insurer is discharged. In this case, the long delay at Batavia was a deviation—and consequently a termination of the first voyage. What reason was there for such a delay? If the seamen could be kept there one year, their articles would hold them there half a century, or any indefinite term. Batavia was held out as the chief port, the *terminus ad quem*; and the ports "from thence" were to be visited in continuation of that voyage. The voyage to Japan was a new voyage, and entirely out of the usual course of business. The taking on board a Dutch governor and Dutch property was an increase of the peril, be-

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cause it subjected the vessel to suspicion and condemnation, and it would be very unreasonable to make the seamen incur a hazard which was never communicated to them.

For the Respondents.—The whole contract respecting bills of exchange arises from legal implication: not a word is inserted by legal implication. So it is in the mariner's contract; every seaman knows what his contract binds him to do. It is immaterial if he is ignorant of his duty—for the law will not believe him. What benefit has the owner derived if the mariner perform but a part of the voyage? Here the owners lost the whole voyage, and the court is called upon to apportion the contract. The vessel was at Batavia during the operation of the embargo, and the seamen subsisted at the expense of the owners. If the seamen had been brought home they would have been idle.

The law of insurance may safely be allowed to apply to this case. The stay at Batavia was not only reasonable but absolutely necessary, by reason of the embargo. It is absurd to contend that seamen are entitled to know what shall be the operations of a voyage. Such a doctrine is practically pernicious to the state, and destructive of all commercial enterprise.

If the sailing from Batavia be a new contract, where is it? Whether that new contract arise from implication or record is immaterial; for that voyage, if it be called a new voyage, was entirely broken up by the capture.

DUVAL, C. J.—This is a case depending on the terms of the shipping articles. The voyage was to commence at Baltimore, and proceed to Batavia; thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore.

The terms of the articles are plain, and must have been clearly understood by the parties. There is a difference of opinion as to the effect of the voyage, from Baltimore to Batavia; the difference commences there. On the one hand, it has been contended that the extension of the

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voyage to Japan, was not justified by the articles, and that the ship was engaged in an unlawful commerce; on the other, that it was in pursuance of the terms of the articles, and that that commerce was lawful.

The court have no doubt on this point. It appears to them to be within the letter and spirit of the shipping articles, and that there was nothing in the voyage repugnant to the principles of neutral rights. The condemnation at Bombay under the orders in council cannot be regarded by this court. This court denies the legality of the orders in council, which are founded on the prostration of the principles of neutral rights and in their decisions they will respect only the general law of nations.

The only question about which a doubt can arise, is, as to the time when the claim of the mariners for wages, whilst at Batavia, shall cease.

The court think it a case in which they ought to exercise a discretion, more particularly as the vessel waited at Batavia for some time, for instructions.

They are of opinion, and so order, adjudge and decree, that the mariners be paid to an intermediate day between the third day of June, 1808, the time when the vessel was unladen, and the 27th April, 1809, the time of her sailing from Batavia, that is to say, until the 15th November, 1808.

That the representatives of the mariners who died before that day, receive wages until the time of their decease; and of them who died afterwards, receive in common with the survivors, until the 15th November, 1808.

Scott, Brice and Harper, for libellants.

Purviance & Pinkney, for respondents.

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Circuit Court of the United States, District of North Carolina, May Term, 1818.

THE UNITED STATES *v.* SCHOONER MATILDA.

- * 1. The act of congress of July 6, 1812 on the subject of license was not an abrogation of the law of nations prohibiting intercourse and dealing with an enemy but was merely cumulative.
2. As the president's commission to a privateer authorized only the captain and lieutenant by name, their officers and crew, to make captures, a capture made by the crew while in a state of mutiny and with the captain confined, does not enure to their benefit, and cannot be made so to enure by a subsequent ratification of the captain.
3. The ordinary papers of a ship being regular, the mere possession of an enemy's license is no evidence of an intention to proceed to an enemy's port ; it being justifiable to carry papers to deceive the enemy.

THIS was a libel in the Admiralty, seeking the condemnation of the Matilda and her cargo as lawful prize ; and was filed and heard in the District Court at Wilmington, at May term, 1818.

The libel charges among other things that the schooner Matilda, being a vessel of the United States and belonging to citizens thereof, did depart from the port of Newbern since the 11th of March last, with a cargo of shingles, scantling, and corn, bound for some British port in the West Indies, to wit, some port in Antigua, Montserrat, St. Christophers, Nevis, or the Virgin Islands, with an intention on the part of the master and owners of disposing of the cargo to the inhabitants (being British subjects) of some of said islands. That on the 5th of April, 1813, (the day of capture) in lat. 26 deg. 39 min. north, long. 68 deg. 17 min. west, the Matilda was sailing under a British license which authorized the importation of said cargo from the United States into the said British Islands.

A claim and answer was put in by Thomas Jerkins, the master, and one third owner of the schooner and cargo, and

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by Moses Jarvis, for himself and his partner Sylvester Brown, owners of the other two thirds, all citizens of the United States. They state among other things, that the schooner and cargo were seized about the 5th of April, 1818, by the Gen. Armstrong, on the high seas, while said schooner was proceeding from the port of Newbern, North Carolina, to the island of St. Bartholomews, in the West Indies; that she was regularly cleared for said voyage; that they, the claimants, had given bond, according to law, that she should not proceed to an enemy's port; that she was at the time of seizure, in the direct course to St. Bartholomews; that they, the claimants, had no intention of proceeding to an enemy's port; or of having any commercial intercourse with the enemies of their country; that said claimants had coffee lying at St. Bartholomews, which they were desirous to bring home, and which partly induced the prosecution of said voyage; that the schooner was boarded and taken by the crew of the ship, and the master, Thomas Jerkins, ordered on board the ship, the said crew being in possession at that time of no other papers from the Matilda, as claimants know of, than the regular documents of the vessel and a letter from Jarvis and Brown to Jerkins; that on the 5th day after the capture, two men opened Jerkins's trunk, and having searched his pocket-book, found therein two papers, commonly known as British licenses, which were procured by Jarvis and Brown, from American citizens, and were intended to protect the Matilda from British cruisers on her said voyage to St. Bartholomews; that at the time of capture, the seamen of the General Armstrong were in a state of revolt, mutiny and rebellion, the captain of said ship being confined to his cabin and his authority usurped—and they submit whether a capture thus made can be good prize. To this claim and answer, is annexed the affidavit of the claimants Jarvis and Jerkins, declaring the facts to be true.

The evidence was in substance as follows:—A license signed by H. Elliott, governor of the British leeward Charibee Islands, at Antigua, the 22d of January, 1818, to be in

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force from the date thereof to the 30th of June next. This license expresses to be issued by virtue of an order in council, of October 26th, 1812. It is granted to Daniel Multhroe, and permits a vessel being unarmed and not less than one hundred tons burthen, and bearing any flag except that of France, &c. to import into any of the ports of Antigua, Montserat, St. Christophers, Nevis, and the Virgin Islands, from any port of the United States, a cargo of staves and lumber, live stock etc., and every kind of provisions whatsoever, beef, pork, butter, salted, dried and pickled fish excepted, without molestation, on account of hostilities existing between his majesty and the United States, notwithstanding the said ship and cargo may be the property of any citizen or inhabitant of said states, etc., and that the master of said vessel shall be permitted to receive his freight and return with his vessel and crew to any port of the United States not blockaded, with a cargo consisting of rum and molasses, and of any other goods and commodities whatsoever, except sugar, indigo, cotton, wool, coffee and cocoa; upon condition that the name and tonnage of the vessel, and the name of the master shall be indorsed on the license at the time of the vessel's clearance from the port of landing. This license was indorsed in the following words by the claimant Jarvis, viz., "Thomas Jerkins, master of the schooner Matilda, burthen 114½ tons, with a cargo of scantling, shingles, corn, and necessary stores, Newbern, North Carolina, March 11th, 1813."

Another license, agreeing in all respects with the last mentioned, except that this gives permission, in addition to the former, to touch at St. Bartholomews on the outward and homeward voyage to and from the British Islands. This is not indorsed, but both bear No. 46, and are intended probably as a set of licenses. A letter from Jarvis and Brown, written at Newbern, March 11th, 1813, addressed to Thomas Jerkins at Wallace's Channel, states, that since writing the letter which covers the bills of lading, the mail brought the news of the adjournment of congress, and that the senate had put a death wound on the license bill, and

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the bill to prohibit the neutral trade was also killed by the same house, so that we are now in the same situation with respect to commerce as we were before the session commenced. As the non-importation law is still in force, should you think of returning with produce, you will guard against your own government."

The *Matilda* had a regular clearance from Newbern, bound for St. Bartholomews, dated 11th March, 1813.

The bill of lading at Newbern, written by said Jarvis, agrees with the cargo before stated, and bears even date with the clearance; but in the bill of lading the vessel is said to be "bound for the West Indies." The list of seamen was regular, and so was the register.

The president's commission to the General Armstrong is in the usual form, and of date, the 23d November, 1812. The ship is therein stated to belong to John Everingham and John Sinclair; and authority is given to John Sinclair, captain, and David Pearce, lieutenant, of said ship, and the officers and crew thereof, to subdue and take any British vessels, etc., and the said John Sinclair is further authorized to detain, seize and take all vessels and effects, to whomsoever belonging, which shall be liable according to the law of nations and the rights of the United States as a power at war, and to bring the same into some port of the United States, in order that due proceedings may be had thereon.

William Livingston, a witness for the libellants, swore, that on the 5th of April last, the *Matilda* was brought to by the General Armstrong; that Jerkins was ordered on board the ship, and his papers demanded; upon which he delivered the register, clearance, bill of lading, and list of seamen aforesaid—that he, the witness, being then sailing master of the ship, declared he would send the schooner into port; to which Jerkins replied, that he had not seen all his papers, and pulling two more out of his pocket gave them to this witness, which proved to be the endorsed license, and the letter from Jarvis and Brown to Jerkins as aforesaid—that a few days after he searched Jerkins's trunk, and found therein the indorsed license aforesaid—and that he com-

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manded the ship at the time of said seizure. Upon his cross-examination, he declared that Captain Sinclair was confined to his cabin by some part of the crew as he understood ; that it is not common for the sailing-master to have command of the ship, when the captain is on board—that Sinclair, Everingham, and others, were owners of the ship—that Captain Sinclair authorized him to act as sailing-master—that Sinclair did not seize, or assent to the seizure of the Matilda.

James Johnston, another witness for the libellants, deposed that the General Armstrong arrived at the port of Wilmington on the 16th of April, and the Matilda on the 19th—that Captain Sinclair put him on board the Matilda, in the port of Wilmington, to take an inventory of the effects, and to dispossess the mutineers—that he was first lieutenant of the ship, and held possession of the schooner under the authority of Captain Sinclair—and upon his cross-examination said, at the time of the capture, Captain Sinclair was confined in his cabin, and that he, the witness, was confined in the ward-room with liberty to go on deck, but to have no communication with the crew—when Jerkins came on board, he, the witness, was ordered out of the ward-room on the forecastle, by William Livingston, sailing-master, and then commander, but was not to communicate to Jerkins the state the ship was then in—that on the 18th March, while the captain and he were together in the cabin, the doors were shut on them, and they confined by the master's mate and others of the crew—he saw Jerkins's trunk after it was open, heard that they had gotten another license, but did not see it.

Charles A. Lewis, also sworn on behalf of the libellants, declares that at the time the Matilda was brought to, the General Armstrong was under British colors—he was in the ward-room of the ship when Jerkins came on board—heard Livingston ask him for his papers—saw Jerkins deliver some papers to Livingston—and upon the threat of the latter to send the schooner into port, Jerkins seemed confused, and said “I have more papers that you have not

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seen," and took out of his pocket and delivered to Livingston the indorsed license and the letter aforesaid.

Captain John Sinclair, a witness for the claimants, deposed, that on the 18th March, he was dispossessed of the command of the ship by William Livingston and other officers and crew—that Livingston, who was then under arrest for misdemeanor, took the command of the ship the same night, without authority from him, and continued in command until after the capture—and that the capture was made without his privity or consent; he was the commander and part owner of the ship; he delegated power to Everingham to do in the subject of the capture as he might think proper, as agent for the owners, and the said agent has carried on the proceedings—that he would not from his knowledge of the general character of Livingston, believe him on oath—he appointed Livingston sailing-master when he first came on board, and continued him in that command until the 22d February, when he arrested him for disobedience of orders—that he put an officer on board the Matilda to divest those of the command who had captured her without his privity or consent, and to keep possession of her on account of the ship, until it should be determined to whom she might of right appertain.

The two licenses and the letter were delivered to the collector of the port of Wilmington, previous to the arrival of the Matilda.

Upon this evidence it was argued for the libellants, that the overt act of sailing under a British license was evidence of trading with the enemy according to the tenor of the license; and that the trading with the enemy was an act, for which, by national law, the vessel and cargo so taken *in delicto* were confiscable, and Vattel was relied upon as furnishing the rule of decision in cases of such trading. It was further contended, that the law of nations, prohibiting intercourse and dealing with an enemy, is not abrogated by the act of congress on the subject of licenses, as was decided in Pennsylvania by Judge Peters, in the case of the Tulip.

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For the claimants it was argued, that there has been no act committed; no trading with the enemy, nor any other act violating the rules of general public law: for at most, the evidence proves nothing more than an *intention* to proceed to an enemy's port; and it is contrary to every principle of law and justice to punish a man for his imaginations. The Matilda was in the road to St. Bartholomews, and had not so much as deviated from her course, so as to lay the foundation for the inference that her real destination was an enemy's port. Term R., 85; Park on Ins., 114. But it was not, in fact, the intention of Jerkins to proceed to a British port—his real destination was St. Bartholomews, as declared by the claimants on oath. No evidence has been adduced to repel this positive declaration, except the feeble presumption arising from the mere possession of the license; which is completely answered by the rule, that every man is presumed to be innocent until the contrary appear. It was also contended, that the mutiny of the crew disabled them from making lawful capture, and rendered them obnoxious to a law which affixes the punishment of death to such an offense, and as the commissioned officers were divested of their command by force and wrong, their assent to the capture could not be presumed; nay the contrary was expressly proved.

The argument being closed, and the object of counsel having been stated to be that of obtaining an immediate decision of this court, and of taking the case thence by appeal to the circuit court, so as to have a hearing at the ensuing term, the judge proceeded to deliver his opinion. He remarked on the novelty and importance of the question—that it was important not only as to the amount of property at stake, but was of vast importance in principle and consequences. He glanced at the difficulties he felt in deciding some of the points in the cause without the aid of authorities or of time to reflect. For these reasons he approached the case not without some distrust of his own judgment; but he felt much relief from the assurance that the case would undergo an investigation in a superior tri-

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bunal ; for this reason he thought it not very material how he should decide. He felt it his duty, however, as the case had been argued, to meet the question, and briefly to state the reasons which occurred at the moment to influence his decision. As to the objection that the act of trading was not complete, he had no hesitation in saying that, according to the current of decisions, particularly in cases of blockade, where the principle is the same, the offense was complete, if the real destination was an enemy port ; for this is not the case of a mere will or intention to proceed to such port, which, without some overt act would not be punishable ; but there was an actual sailing and proceeding on the voyage, thereby carrying that intention into effect ; and the point at which the vessel was arrested, affords no grounds unfavorable to the presumption that she was bound to one of the British licensed ports ; because she was in the road as direct for one of those as for the neutral port. The question of fact then is this : Was the *Matilda* really bound to a British port with a cargo ? The judge felt himself bound by the evidence to say that she was ; according to the well known rules in the court of admiralty, that where a suspicion of guilt is created by the possession of documents, it is expected that the possessor will explain away such suspicion by proof ; and where such suspicion is applicable to the charge in the libel, it is *prima facie* evidence of the facts contained in the allegation, and casts the burden of proof on the party charged. Now, he remarked, the possession of the licenses and the letter of advice, unexplained by evidence, is proof to my mind that the vessel was prosecuting the voyage she was permitted to do by the license. It is true the American papers were all regular, and so they must have been to obtain a clearance. Nothing should be inferred from thence, because every man, whether his designs be honest or otherwise, would use the same precaution ; and no man would furnish evidence against himself in a way not at all necessary to the execution of his unlawful designs. The British cruisers know that vessels of the United States must conform to our municipal regu-

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lations ere they are permitted to depart. As to the letter, it bears evidence of some unlawful purpose—for if the real object was a lawful trade, it is difficult to assign a reason for the additional caution, “guard against your own government.” The captain was already apprised of the failure of the license bill, and of the existence of the non-importation act. The object, indeed, might be to import British produce from a neutral port—which, though unlawful, does not fall under the present charge; or, it might be to import from a British port, and to touch at St. Bartholomews, and there obtain a neutral clearance, so as to guard against this government. The latter supposition very well accords with the licenses.

Upon the question of law, whether the act of congress of the 6th July last, upon the subject now under consideration, is cumulative on the prohibitions of international law, or whether it operates as a repeal or abrogation of those prohibitions; the judge expressed much doubt, but yielded to the opinion which had been given by Judge Peters in the case of the *Tulip*, that the act of congress is but cumulative.

The only remaining point to be noticed, said the judge, is one of great importance, and, to the court, of serious difficulty; because I entertain much doubt on it, and have not the aid of books in forming my opinion; it is the question which grows out of the mutiny of the crew of the privateer. From what has been said, it would seem that the schooner and her cargo are confiscable; but it does not necessarily follow that because the property is forfeitable to the United States, the libellants shall take the benefit of such forfeiture.

The president's commission was the authority under which the capture was made; this commission authorizes John Sinclair the captain, to seize, etc., but the evidence is that the captain, at the time of capture, was, by the violence of the crew, put in close confinement and deprived of all command and authority over the ship. As, therefore, the authority was usurped by others, and the vessel navi-

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gated against the will of the captain, all acts done by the crew during such usurpation must be presumed to have been done against his will; or, at any rate, not with his assent either express or implied. The libel is filed in the name of the United States for the use of the owners, officers and crew of the ship. Had it been in the name of the crew only, according to the truth of the case, the objection then would have been, that you have departed from the commission, which was their authority to seize. And taking the case as it stands, it appears a little awkward for the United States to sanction an act that necessarily springs from another which they have said, by the legislature, shall be punished with death. The crew in a state of mutiny made the capture: mutiny is punished with death. And is it competent for the captain to contradict the fact, and now allege that he made the capture, or that it was made by his assent? Or shall he now give a right to himself by relation, and make valid that which was unlawful at the time? The court inclines to a negative answer. What vests the right in the captors? Surely the prize-act—and there it will be seen the right is vested in the owners, officers and crew of the vessel by whom the capture is made.

Upon this point, the court adjudged that the evidence did not support the allegation, and therefore dismissed the libel; but did not decree the restoration of the property. An appeal was immediately obtained and the case brought up to the circuit court at this place, where it was argued at considerable length, at the last term, before the chief justice of the United States, and two points were made, 1st. Was the *Matilda* bound to an enemy port? 2d. Did the conduct of the crew of the ship affect the right of the libellants in the present proceeding? It was conceded that if the *Matilda* was really bound to a British port, the offense was complete. But it was contended that there was no evidence of such fact, except a vague inference to be deduced from the mere possession of the license; for as to the witnesses, it was said, they were interested in the distribution of prize, and therefore incompetent. 4 Rob. Rep., 68, 5 Rob. Rep.,

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307. That the presumption such as it was, in favor of the libellants, was answered by the positive oath of Captain Jerkins, who was a competent witness; and that the licenses were intended as a fraud upon the enemy; a practice which is always permitted.

Upon the second point the counsel for the claimants relied upon, 2d Rutherford's Inst., 564; 3 Rob. Rep., 160—184; Marten's 2 Azunia, 354—362, and Bro. C. and Ad. Law, 461.

The counsel for the libellants took a survey of the evidence, and endeavored to show by fair inference the unlawful purpose of the claimants. He admitted that the claim and answer as sworn to by Captain Jerkins should be taken as though the captain had been examined on interrogatories. Upon the second point he introduced and relied upon as conclusive authorities, Brown's C. and Ad. Law, 281—2, 458, and 8 Term Rep., 224.

The chief justice asked if Captain Jerkins was a competent witness, and being answered by the libellant's counsel that he was, he was clearly of opinion that the charge against the schooner had no foundation. He remarked upon the regularity of the ordinary papers—he thought the letter of advice contained no evidence of criminal intent, but rather the contrary. He stated the question to be, whether the claimants intended a voyage to an enemy port or not. But he saw no evidence of such intention, save that of the license: that it was common and not at all improper to carry papers to deceive the enemy; that the carrying of the license was to enable them to prosecute a voyage to a neutral port under the protection of the license; and that the evidence of Captain Jerkins cleared the case of all doubt by stating the real object, and positively denying the inference drawn from the license. Here the libellants' counsel called the attention of the chief justice to the fact, that Jerkins was part owner of the schooner and her cargo, a circumstance not recollected when the concession was made. The chief justice immediately replied that he was interested and of course incompetent. The

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counsel for the claimants then argued, that this answer should be received as an answer in chancery is; and if so, the answer is to be taken as true until it be disproved. The chief justice admitted the rule in the court of chancery, as to the negative matter of an answer, but not in a case where it asserts a right affirmatively in opposition to the complainant's demand; but he took this distinction between a case in chancery and a case in admiralty: in the former, the complainant calls upon the defendant to purge his conscience and disclose facts; and by this appeal to his conscience the complainant makes the answer evidence: in the latter case no such demand or appeal is made.

The chief justice then said that the case was very different from what he conceived of it under the evidence of *Jerkins*; and expressed a willingness to let it lie over for further proof if the libellants had a prospect of obtaining any; but being told they had not, he said he was still of the same opinion; and affirmed the decree of the district court. He also decreed the restoration of the property, but without damages.

He gave no opinion upon the second point.

South Carolina District Court, July, 1814.

JOSEPH ALMEIDA *v.* CERTAIN SLAVES.

Slaves captured in time of war, cannot be libelled as prize, nor will the district court of the United States consider them as prisoners of war. The court considers the disposition of them as a matter of state policy, in which it is not fit that the judiciary should interfere.

DRAYTON, J. The libel in this case alleges, that during the cruise of the said privateer, on the high seas, she captured certain slaves, "the property of the king of the United Kingdom of Great Britain and Ireland, and the

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dependencies thereof; or, of the subjects of the said king." That in and by a certain act of the congress of the United States, passed the 26th June, 1812, entitled "An act concerning letters of marque, prizes, and prize goods," it is among other things enacted, that all captures of vessels, and property, shall be forfeited, and accrue to the owners, officers, and crew of the vessels, by which such prizes shall be made; reserving to the United States, two per centum, on the net amount of the moneys arising from such captures, and concludes with the regular prayer of condemnation.

In behalf of the United States, a claim was interposed by the district attorney, for the said slaves, as prisoners of war, or otherwise, to them the said United States belonging; denying the right of the said Joseph Almeida, to the said slaves, as prize of war; and concludes with praying, that the said slaves may be adjudged and delivered to them as prisoners of war, or otherwise, and that the costs of their claim be allowed.

This is one of the new and important questions, arising from the present war in which the United States of America are engaged with Great Britain. The court has, heretofore, not proceeded to condemnation of slaves, brought in as prize of war; but, has ordered their confinement as prisoners. And in some cases, they have been received as such, by the British authorities resident in this city. The interest of parties, however, require at this time, a formal decision on the point of prize; to obtain which, the libel, in this case has been filed.

It is contended by Hayne, for the libellant, that by a true construction of the rights of war, and particularly in pursuance of the prize act of the United States, specially referred to in the libel, all captures and prizes of vessels and property, shall be forfeited and accrue to the owners, officers and crews of the vessels making such captures. That negroes and persons of color, held in slavery by the British are as much slaves, as those held in slavery by our own citizens. That they are not real, but personal property; considered as assets in sales, and in distribution of estates.

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And therefore, they come within the meaning of the word property, as mentioned in the 4th section of the said act; (2d vol. Laws U. S., 240) and, consequently, are liable to condemnation as prize. That the law must be so construed, not only as respects the public interests, and the intention of congress in passing the prize act; but, as protecting the rights of all concerned in privateering; and, as encouraging the exertions of our citizens to attack and injure the enemy. And more particularly so, in retributive justice; as the enemy have taken so many slaves belonging to our citizens, and have appropriated them to their own use, as prize of war.

On the part of the United States, it is insisted, by Parker, (District Attorney) that the right of condemning the slaves as prize of war, does not attach in favor of libellants; but, that they must be considered as prisoners of war or otherwise, in behalf of the United States. Because other than such a construction would be at variance with the act of congress, passed on the 2d of March, 1807, prohibiting importation of slaves. (8th vol. Laws U. S., 262.) That slaves cannot be considered as property, under that term, in the prize act; because, it could not have been the intention of congress to consider them as prize, springing out of the events of the war. For, were this the meaning of the legislature, the act prohibiting the importation of slaves would have been repealed, so far as it had any collision with the war or the prize acts.

I have never had any doubt on this subject. But, as those interested in such captures appear not satisfied, by a non-judicial divestment of what they claim as a right, it is better that the question should be, at length, seriously brought before me.

Did the question turn upon the meaning of the word property, as relating to slaves, something might be said in support of such doctrine; not only, upon the principle of the civil law which considers slaves not as persons but as things (1st Brown's Civil Law, 100, 101, 108,) but also, from the custom, usage and meaning in law, of those of our

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states, possessing this property. But, as only one portion of our union, permits this property in slaves, it cannot be supposed the other would in a general law, intend it was to be considered as prize. These two different interests are represented in congress; it is the united votes of that body, which have passed the prohibitory act. And it is but reasonable to believe those not permitting slavery, did not, and would not, concur, in such a construction, as is contended for, by libellant.

But there are stronger reasons why a condemnation in favor of the captors, should not be decreed. In the first place, the act prohibiting the importation of slaves, was made by congress, with the evident intention of forever thereafter preventing this importation. This act was passed to take effect at the earliest period (1st January, 1808,) at which the Constitution of the United States permitted congress to prohibit their importation. For until that time, the states interested in negro importation would not have been controlled but by their own acts. And congress having so early used such prohibitory power evinces their disapprobation of such commerce, and of adding to the number of slaves in the Union; and of course, their determination to maintain such prohibition strictly. It is true, this law was made in time of peace, it is not a war measure. But, it does not thence follow that it is to be superseded or repealed by a declaration of war; or by the passage of a prize act. It does not follow that an act passed as a general and standing municipal law shall be repealed by a prize act, brought into existence for the purposes of a particular war, unless such repeal manifestly appears. It would argue a want of caution in our legislature, which ought not to be supposed. It enacts "That from and after the 1st day of January, 1808, it shall not be lawful to import or bring into the United States, or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of color, as a slave, or to be held to service or labor." This section, therefore, is general; it

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applies to all vessels, whether of war or otherwise. For, "*ubi lex non distinguit, nec nos distinguere debemus.*" It is also imperative, being without any condition, or exception. This further appears by perusing the different sections of the act—as where the public interests required, the general bearing of the first section should be controlled or mitigated, there the act is not silent, but declares in what manner it shall be done. So by the 7th section, permitting the capture, and bringing in of any ship or vessel hovering on our coasts, having on board any negro, mulatto, or person of color, for the purpose of selling them as slaves; or with the intent to land the same, in any port or place within the jurisdiction of the United States. (8 vol. Laws U. S., 266.) But even in this case, those persons are not to be sold; they are to be disposed of otherwise, as therein is directed. The party capturing receives nothing from the proceeds of such negroes, mulattoes, or persons of color; his emoluments arise only from the proceeds of the ship or vessel, her tackle, apparel and furniture, and the goods and effects on board; and this under a special proviso, that to entitle him to such reward, he shall "keep safe every negro, mulatto or person of color, found on board of any ship or vessel, so seized, taken or brought into port for condemnation, and shall deliver every such negro, mulatto or person of color, to such person or persons as shall be appointed by the respective states, to receive them, etc." Hence, as respects the rights and interest vested by the prize act, congress has legislated with caution. When to give energy to that act, that body meant former acts, or parts of acts to be repealed, the same has been expressly enacted; it has not been left to a court, to advance one step farther than was intended by its decreeing a virtual repeal. For, it is only under such a decree, or by such a construction, that the cause of the libellant can be sustained. This is evident, by referring to the 14th and 16th sections of the prize act; which for the purpose of giving free scope to its operations, expressly repeal so much of the non-importation and embargo laws as relate to prize goods, or private armed vessels; but, nothing

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is said as to the prohibitory slave act. It follows then, that congress did not intend to repeal such act, as relating to prize of war; as "*Exceptio probat regulam, in non exceptis.*" And slaves are not considered therein under the term property, or as goods and effects; as is evident by the remunerating clause of the prohibiting slave act, (sec. 7,) before mentioned. Congress has therein clearly expressed its opinion on this point; and it is not then for this court to suppose a different construction.

I am, therefore, of opinion, the negroes or persons of color, so libelled, cannot be condemned as prize to the captors.

The only question now remaining for consideration, is whether the claim in behalf of the United States, for the same as prisoners of war or otherwise, shall be sustained, or, if not sustained, whether this court will in any, and what manner, pronounce judgment in the premises?

As to the claim of prisoners of war, I do not think it proper to decide thereon. It appears to me, as the laws of the United States are silent on the subject, it becomes a matter of state; respecting which it is not for the judiciary to determine—the right to do so remaining with the government of the United States. Because these persons may have been heretofore informally considered as prisoners, it is no reason this court should now decree them to be prisoners of war. And on this point there is much similarity, with the reasoning and cases in law, respecting head money. In which the court of admiralty pronounces not whether due, but only the number of men taken; leaving the remuneration to the sovereign power. 1st Robinson's Admiralty Reports, 157.

Under these impressions, I do adjudge and decree, that the libel be dismissed with costs. And that the claim of the United States be sustained, so far as to detain the said negroes, mulattoes or persons of color, in the possession and custody of the marshal; subject to such disposition and uses, in favor of the United States, whether as prisoners of

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war, as prize to the United States, or otherwise, as shall lawfully be declared, and directed in the premises. And lastly, I adjudge and decree that the libellant pay also the costs of the claim in this case.

*United States Circuit Court, District of South Carolina,
June, 1816.*

FISHER ET. AL v. THE SYBIL.

1. From the origin and history of salvage it is plain that the mere fact of a vessel's being derelict in the modern acceptation of the word (as contra-distinguished from the case of pure derelict, where no owner appears and the residue becomes a droit of the admiralty), does not of itself entitle a salvor to a higher award; but the true rule is that each case must be judged by its special circumstances.
2. The custom of awarding a proportion in salvage cases originated when commerce was carried on by actual exchange; but in modern times when property is represented by money, the court may decree compensation either numerically or by ratio, as it deems proper.
3. A vessel 800 miles from the coast and 400 miles from Norfolk, with main- and mizzen-mast gone, and leaking somewhat, but not beyond the control of the crew, with rudder injured but capable of repair, was taken in charge by another vessel which took the crew off and put on a crew of her own, and ordered them to go to Jamaica. The master of the prize crew, however, carried the vessel to Charleston, against the protest of the owner of the salving vessel. *Held*, that this was not an act of mutiny.
4. The vessel and cargo being worth \$100,000, one fourth was awarded as salvage and distributed among the different salvors.

IN ADMIRALTY.

JOHNSON, J. If ever there was a case in which the claimants on a libel for salvage were thrown upon the protection of a court, this is one. There is not a witness to anything that occurred on the ocean, who is not interested in increasing the compensation. Even Dangerfield, the master, to extricate himself from damages and censure, finds his interests coincide with those of the libellant, in

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sary distinction between wreck and derelict, the cruel purpose of removing a claimant or a witness could have operated to expose the lives of shipwrecked persons, but there is too much reason to infer from the laws which have been passed for their protection, that some protection was necessary. In the laws of Oleron, 31st art., it is asserted that this often happened; and as late as the year 1798, in a case which occurred before Sir William Scott (*The Aquila*) we find a magistrate alleging on oath, that the plundering of a wreck is customary on that part of the coast of England where he resided.

For the modern acceptation of the word derelict we may very safely take the definition of Sir Leoline Jenkins, as given us by Sir W. Scott: "boats or other vessels (or, he may have added, any goods washed overboard at sea, or floated away from land) forsaken, or found on the seas, without any person in them, of these the admiralty has but the custody, and the owner may recover them in a year and a day." And such the form of the libel usually filed in such cases, declares it to be, to wit: "found floating to and fro on the high and open seas." Such goods are in the first instance pronounced derelict in the restricted sense of the word, to wit: abandoned from fear or necessity. But after the year and day they are considered as pure derelict, as having been absolutely and voluntarily abandoned, so that the sum or portion reserved in the registry of the court becomes a droit of the admiralty. If there is anything in the law of salvage which distinguishes the case of a salvor or derelict, in the modern acceptation of the term, from any other salvor, I have never been able to discover it. Whether we refer to the reason of the thing, or to adjudged cases, the court appears to possess an equal latitude of discretion in all cases of salvage, and rewards either by adjudging a compensation in ratio or in number, as it thinks reasonable. One general rule, and that alone appears to run through all the cases, and that is "the compensation must be liberal, and that too not only with a view to the value and endangered state of the thing

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saved, the risk incurred, the skill and labor bestowed, but with a view to the general interests of commerce in promoting exertions in such cases, and to the interests of mankind in rewarding and promoting generous and magnanimous actions. The court undertakes to direct not only the justice but the generosity of the claimant. However the ancient idea that wreck and derelict was the property of the crown may have been exploded in modern times, it is very certain that something like that idea has been preserved in the adjudication, between salvors and claimants, as to the quantum which each shall retain of the thing saved. Such unlimited discretion has always been assumed, as looks very much like acting under the principle that "*cujus est dare ejus est disponere*." That it is not a mere case of *quantum meruit* is universally allowed; and why the court should prescribe a rule to the generosity of the claimant under any other idea, is difficult to discover. For the same reason it is that a compensation has been awarded to an apprentice boy instead of his master, and hence perhaps also such liberties are taken with the reasonable rules of evidence as suffer parties to make out their case upon their own affidavits, as they do in some measure in prize cases, which are certainly boons of the government. If the case of derelict, according to the modern acceptation of the term, be considered, with a view to the reason of the thing, there will be found to be in it no ground necessarily attaching to it a superior claim to all other compensation. It is very easy to conceive a case which cannot come within the definition of derelict, which would rally all the best feeling of the heart around it in support of a reference. Take the case of a vessel whose crew is sick or exhausted, or devouring each other for food; or take the case of a vessel without boat, on fire, or stranded, with her whole crew on board, and in danger every moment of going to pieces, where not only the vessel, but the lives of the crew are saved. In a case of pure derelict, as of a pirate, where the court knows at the time of adjudication, that the residue must be adjudged a droit, and where, of course, it is a

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mere bounty to the government as well as to the individual, it may very well be conceived that the court would be very liberal in awarding salvage; but when the party himself, the original owner, puts in his claim, and sets up the plea of misfortune, the case is widely different; and traces of this distinction will be found to exist in the ancient sea laws of Europe. Sir W. Scott, in the case of *The Aquila*, in considering the question whether a moiety could be claimed *de jure* by a salvor, has said, that he could find no trace of such a right in the Consolato del Mare. As applicable to the case of derelict, according to the modern meaning, this eminent judge is unquestionably right; but the modern meaning was not probably attached to the word when those laws were compiled, for they are of great and no ascertained antiquity. But in the case of pure derelict, where the other moiety is to be given to the lord and the poor, the one moiety is by the Consolato del Mare given to the salvor (c. 252,) and hence probably originated the English rule which appears to have existed in a remote period, that the thing saved should be divided by moieties between the salvor and the king. But by the laws of Oleron, which are of the highest authority in this court of any of the ancient systems, all persons were required to aid and assist in saving shipwrecked goods, "and that without any embezzlement or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein according to right, reason, or good conscience, and as justice shall appoint." Article 29. This article probably laid the foundation of the jurisdiction which this court is now exercising. In the 45th article of the second fragment of the law of Rhodes it is enacted "that if a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one fifth of what he saves." Although this article does not say what is to be done with the residue, yet it evidently relates to a case of restoration, as appears by the next or 46th article, according to which "if any one find a boat, which

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has broken loose from a ship and drifted to sea, and preserves it safe, he shall restore everything as he found it, and receive one fifth as a reward." Although the counsel in *The Aquila* argued that one half was the usual and favorite salvage in case of derelict, yet unless they meant to confine themselves to voluntary or to total abandonment, it would rather seem that (in ancient times at least) one fifth was the favorite proportion in cases like the present, or even stronger cases. For shipwrecked effects found on the high sea or "fished up out of the bottom of it," the ordinance of Louis XIV. allowed a third to the salvor, the remainder to be restored to the owners, sec. 45, art 1, s. 27. If then we compare the ancient sea laws with modern decisions, we find that, except in case of pure derelict, they were hardly as liberal as the courts of admiralty are at the present day; and modern liberality has, I fear, been too much exerted, from a want of attention to the distinction between cases where the residue becomes a droit, and those in which it is restored to the original owner. I cannot think the argument a sound one that salvage in fact falls upon the underwriter who has been paid for the risk; for the *spes recuperandi* is one of the perquisites of the insurer, and which combines with others to enable him to underwrite at a less premium. Nor can I admit that the compensation to the salvor must be in a certain ratio to the thing saved, or that that ratio is not to be diminished from relation to the amount.

The question to be decided by the court is always one to which no fixed rule can be assigned. How shall the salvor be compensated? is this inquiry. And how is it possible to produce uniformity in the decisions of courts, where the judges are to act on circumstances endless in their variety and combinations, and of which any two men may take different views? Or how is it possible to detach the mind from considering the amount saved both with a view to increasing the compensation as to the claimant on the one hand, and diminishing it as to the salvor on the other? As to the question whether it shall be in proportion or in

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numero; if the judge, knowing the value of the thing saved, is unrestricted in fixing the compensation, it is immaterial to bind him down to the fixing of it by way of ratio, since it is so easy to bring it to numerical precision. It is true, that it has been most usual for courts to adjudge in proportion: but the reason of that is evident. Courts of justice, perhaps more than any other constituted bodies, will receive a tone in their proceedings from the *mores majorum*. At a time when commerce was carried on by actual merchandise, it would have been the most simple and natural mode of compensation to make an actual division of the thing saved, if susceptible of division. But at the present day, money, the medium of commerce, expresses the value and all subdivisions of property with a more convenient precision, as it is the standard by which the mind is accustomed to compare the value of things. That such a practice should have prevailed is easily accounted for from this cause. It is evident, that whenever a legislative power undertakes to affix a compensation by way of salvage, it can only do so by assigning a proportion to the salvor. This is done in all the ancient systems of sea laws: and this very naturally led to the practice of assigning a proportion for salvage in the adjudications of the admiralty courts. But under the practice of modern times and the laws of Oleron, I hold an admiralty court to be at large to decree compensation either numerically or by ratio, as it deems proper. But could I be induced to attach any importance to the idea of derelict abstractly considered I should not adjudge this to be a case of derelict even in the modern acceptation of the term. The vessel was not found derelict upon the ocean, and when she was deserted by her crew, all the witnesses prove an express abandonment of her to Mr. Fisher, or the ship's company of the *Margaret*. "There she is, make what you can of her." Her actual state of distress then, and the merits and compensation of the respective salvors shall govern my decision, without attaching any technical importance to the epithet by which her state may most correctly be designated. And here while the practice of the

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courts permits each claimant to make the most of his merits on his own affidavit, it is impossible for the mind to detach itself from the conviction, that the testimony of any man is to be received with due caution, where he swears in his own behalf. And we are naturally led to the consideration of these facts, concerning which there can be no dispute, and these parts of the testimony of each witness which have no immediate bearing upon his own interests, as furnishing the best grounds to form an opinion upon. As to the state of the vessel, the case furnishes satisfactory evidence on all points except two leaks. The main and mizzen masts were gone, with all their rigging, and most of their spars, and in going overboard they had carried with them a part of the bulwark. The long-boat, at the time of the abandonment, though leaky, was fit for use. Afterwards it appears to have been materially injured. Water and provisions she had in abundance, and a ship's company consisting of sixteen persons, all of whom, except one or two (perhaps three) were fit for duty. Her foremast and bowsprit, with all their rigging were perfect; and the hull of the vessel new, staunch, and strong, so much so, that a ship-carpenter of great skill and experience says, "the men ought to be hanged who would have deserted her." Her nautical instruments were in sufficient preservation, her reckoning accurate, and they were at the time of meeting not above three hundred miles from our coast, not above four hundred miles from Norfolk, where the vessel was owned, and about the same distance from Philadelphia and New York, where her cargo was owned. The wind was tolerably fair for the first port, and there was little difficulty in making any port in the whole extent of the American Atlantic coast. On the state of her leaks, the evidence is various and contradictory. When they took possession of her, Fisher says, she had four feet of water in her hold: Jones makes it only thirty or forty inches. Fisher says she made eighteen inches per hour, whereas in port she did not make above seven; but on this point there are three facts in which all concur: 1st, that four hands pumped her dry before 12 at night; 2nd,

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that only seventy-three bales of her cargo were damaged, and those so little as to sell for above twenty cents per pound; 8d, that the leaks did not cause the abandonment, for they were known when the ship first hailed the Margaret, at which time the captain of the Sybil expressed no idea of abandoning her. Some of the witnesses, indeed, say, that on hailing a second time, Dangerfield declared they had sprung a fresh leak. But Dangerfield in his protest says nothing of the kind, and he would not then have omitted it had it been true. I therefore conclude that the leaks did not very greatly endanger her safety.

We now come to the very material cause of the abandonment to wit, the state of the rudder; and this indeed was the only cause,—for the protest and the evidence show that before this discovery, the captain was so far from intending to abandon her, that he only requested a supply of cordage and sails from the brig, and upon being informed that they could not spare any, he made sail away on his course. On this point the evidence is also various and contradictory.—Dangerfield in his protest alleges that it hung together only by a few splinters; but this is a gross exaggeration. The rudder must have been injured in the gale, and the vessel had been nearly two days working with it in that condition, when she fell in with the Margaret. Besides, the shipcarpenters who have examined it in port agree that it required but little skill, labor, or risk to mend it. Captain Todd thinks that any gentleman then in the court room could have mended it; and several other witnesses agree that it was a very poor apology for abandoning the ship. To this we may add, what is very well known; that the loss of a rudder is by no means fatal, as a ship may be steered by her sails or by a cable, or by both in co-operation. I now come to the most disagreeable part of this case, to examine the respective merits of the salvors—and first, of Fisher. This gentleman claims salvage on account of personal services; on account of being the owner of the Margaret, and on account of the freight of her cargo, and the sum awarded him by the district court would amount to more than twenty thousand dollars.

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I have pondered long upon the merits of Mr. Fisher, not uninfluenced by a reluctance at differing very widely from the opinion of the district court, or of underrating the services of any man, especially one of such high pretensions. But really no effort can bring my mind to place this salvor on a pre-eminent footing of merit. I look in vain throughout his conduct to discover one trace of magnanimity or disinterestedness. Nothing appears in it but selfishness. He first claims a very high salvage from the owners, and then in the spirit of monopoly finds some pretext or other for excluding his fellow adventurers from sharing the golden harvest. I am far from cherishing the Utopian notion, that pure disinterestedness is to be expected from man. But salvage is not a compensation for what we do for ourselves, but what we do for others. And the man who in the prosecution of selfish views can forget what is due from man to man—I will not add from a brother sailor in a state of distress—comes with a bad grace into this court to lay claim to that liberality which is the acknowledged meed of gallantry and generous sentiments. The compensation of such an one should be limited to mere *quantum meruit*. I am led to apply these remarks to Fisher from the following considerations, drawn from his own testimony. 1. It is in evidence that Fisher was bred a shipwright, and his skill, dexterity, and exertions as such, form a chief ground of his claims to compensation. It is also in evidence that when The Sybil approached the Margaret the second time, Fisher came on board, and he and Dangerfield went into the cabin and examined the state of the rudder through the windows. Upon being then consulted expressly with regard to the rudder he told the captain—to use his own words—“that it was in an extremely bad state.” Now the contrary of this has been expressly proved, and he himself proved it by repairing it the next day. That he was ignorant of its actual state, and of the means and facility of repairing it cannot be supposed, whether we consider his skill as a shipwright, or his readiness to go on board immediately and take charge of her with only four men. Then what did

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moral duty point out to him as the conduct to be pursued on that occasion? Not surely to increase the alarm of the captain by magnifying his danger, but to point out the means by which it could be repaired, and tender his assistance in repairing it. Doing otherwise looks too much like a premeditated design to take advantage of the fears, ignorance and imbecility of the captain, to get possession of the ship. But after getting possession of her and putting her in the partial refitment with which she reached this port, if he had in his subsequent conduct shown that he was at all influenced by considerations drawn from a view to the interest of the owner, this would have operated to remove the unfavorable impression which his conduct respecting the rudder was calculated to produce. Instead of which we find, that when he was but three hundred miles from the American coast, he bore away for Jamaica, distant at least one thousand miles, at a time when those seas are much more exposed to the danger of tempestuous weather than the north coast of the United States. I do not deny that he was justifiable in doing this, for after being in possession of the vessel, they had a right to judge for themselves how far keeping company with the Margaret outweighed all other considerations; but if in their decision, as to their course, the interest of the owners gave way to personal considerations, this certainly lessens their right to demand compensation from those owners. And as the vessel was sufficient to have made the voyage to the United States alone, no one can doubt that the interest of the owners was pretermitted in the attempt to go to Jamaica. I consider Mr. Fisher for these reasons, as a salvor who had nobody's interest in view but his own, and as entitled to compensation in proportion to the incidental advantages resulting to the owners. And here may it not be asked, had the owners any cause to rejoice that the Sybil fell in with the Margaret? Would it not have been for their interest that the ship had not encountered her or any other vessel at sea? She was competent to make the voyage to the United States in all human probability, and they might then have repaired her, earned

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her freight, and escaped the payment of salvage. Certainly no service was rendered them by taking out the crew. And had not the crew been taken out, possessing as they did the competent means of saving their lives, in the effort to do so they would have saved the property. In one view, therefore, Mr. Fisher may be considered as the innocent cause of doing the owners material injury. But it will not do to act upon that view of the case, for the cause of humanity forbids that the captain of the Margaret should have refused on any ground to take the crew of the Sybil on board if requested. It is therefore a case of salvage, but not a case of the highest order. And as no one could have left the Margaret without Fisher's permission, I certainly consider him as the *dux facti*, and as such ranked above all the salvors. But he cannot lay claim to the credit of having either navigated or commanded the Sybil, or having even discharged the duties of a mate on board of her. As to the individual merits of the salvors, it is not necessary to remark very particularly on the evidence respecting them. Jones evidently was master and navigator on board the Sybil. However Fisher may have been his superior on board the Margaret, he certainly ranked his former owner on board the Sybil. The whole crew received and acknowledged him as captain. Rice appeared to have acted as next in command, and to have enjoyed an acknowledged superiority. Beech the landsman, a character always sneered at on board ship, did his best, and deserved much credit for having volunteered among the first: not a little in my opinion from a consideration of the doubts and fears which may be reasonably expected to attend a landsman in such an undertaking. With regard to the six colored seamen who belonged to the original crew of the Sybil, some questions of considerable nicety and difficulty arise. 1st. Whether they are to be regarded as salvors, or referred to their original contract with the ship. 2d. Whether if considered as salvors, they shall themselves receive their compensation, or it shall be adjudged to Fisher, or if not to him, to the whole ship's company of salvors. Fisher claims the whole, under

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an agreement which he sets up as having been entered into by these men to navigate the Sybil for twenty-five dollars per month. It appears that the day after they took possession of the Sybil they hailed the Margaret and inquired if any of the Sybil's crew who were then on board the Margaret "would volunteer" (that was the expression) on board the Sybil. These six men then came on board the Sybil; no agreement was made while yet in the Margaret, but after they are on board the Sybil they make this agreement which is set up by Fisher. I omit here, as I have omitted all along, to make any reference to the evidence of Francis, as I could wish, if possible, to avoid giving weight to any man's testimony except where it makes against himself, or his interests are unaffected by the consequences. But I confess I feel a strong moral repugnance at admitting the claim of Fisher, so far as it is founded upon the services of these men. That he who claims twenty thousand dollars compensation, and who without the aid of these men could never have earned a cent of it, should be enriched, whilst they who never, according to Rice's testimony, voluntarily quitted the ship, and who returned to it expressly as volunteers, should be put off with scarcely enough to buy them a suit of clothes, carries with it something very inconsistent with moral propriety, and I acknowledge that it is with pleasure I lay hold on any ground to get rid of the necessity of making such a decree. The case affords two sufficient grounds. 1st. It is acknowledged that they were called upon to enter as volunteers, and under that idea they came on board the Sybil. No agreement was made for wages on board the Margaret, and whether a parol agreement was made before the written agreement or not, still it was not made till they were in a situation in which every seaman feels that he is not a free agent. The confirmatory agreement made after their arrival in port, is liable to the same objection, and I here explicitly acknowledge that I am not satisfied with the fairness of the one or the other. But there is another ground of objection. Whatever may have been Fisher's situation on board the Margaret, when they

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entered on board the Sybil, associated with four others, their emigration was complete, and they assumed new relations, although they could not have quitted the Margaret without Fisher's consent, yet neither could he, without their consent, have forced them to quit her. When therefore they entered on board the Sybil, they had their rights as well as Fisher, and he could no more lessen their compensation as salvors for his own benefit, than they could his. The agreement, therefore, with the black seamen, if it operated to deprive them of their claim as salvors, enured to the benefit of the company of salvors; but they set up no claim under it, and acknowledge that it was not explained to these seamen that they were to forfeit their claim to salvage. But here another question arises—are these seamen, as relates to the owners, to be at liberty to depart from their original relation, and assume the new one of salvors? One thing only, can sanction such a departure, and that is, they have not been in default.

Their captain, against their will, as Rice testifies, obliged them to quit the Sybil, and he could not afterwards control them to prevent their assuming this new relation. They were freed from their original contract, and at liberty to act for themselves; I shall therefore adjudge them entitled to a compensation by way of salvage. But what is to be done with regard to Perry? He is clearly proved to be an absconded slave, and his owner has lost his services for several years. To this I reply, that whatever may have been my decision, had he been at the time hired out for the benefit of his master, since he was in fact a runaway, his master must receive his compensation and not himself. One more question remains to be disposed of. The ship had proceeded six hundred miles on her way to Jamaica, when Jones and the crew, without the consent and against the will of Fisher, altered their course in the night and made for this port. Fisher contends that this was an act of mutiny, which worked a forfeiture of the rights of all concerned in it. But it appears to me that this deviation was the first act, unquestionably correct, done by the com-

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pany of the salvors. Jones was unexceptionably the master, and even if we view Fisher as the owner, which is the highest grade to which he can pretend, his station at sea is inferior to that of the master. There could not be a mutiny then where the master headed the opposition. The ship's company had a right to alter the ship's course for the good of all concerned, and more especially to make an alteration so materially beneficial to the owners of the vessel and cargo. It was the first instance in which Fisher's interest had given way to those of the owners, and this was violently opposed by him. Besides, if this forfeiture had occurred, it would not have been to the benefit of Fisher, but of the owners, and it would be absurd to adjudge that a cause of forfeiture which clearly tended to their benefit.

In the course of the argument, the case of *The Blaireau* was often cited; and that case was very justly considered as the best standard for governing our decision in this. I readily receive it as such; and think, that when compared with that, the merits of this case are strikingly inferior. 1st. The amount saved was only about two-thirds the present amount. 2nd. The attempt to save the *Blaireau* was universally acknowledged to be attended with great danger, almost desperate, such was her leaky and shattered state; here the danger is universally allowed to have been but inconsiderable, as the loss of the masts in fact, in some measure diminished it. The distance navigated there, is stated to have been three thousand miles; true or false, is immaterial, if the court were under the influence of that impression. If the owners' interest had been considered, it need not have been navigated above twelve hundred. Whether the *Blaireau* was derelict or not, I have before declared, technically immaterial, but I should think it unavailing to contend that Toolles being on board, could diminish the merit of the salvors. To the merit of saving the property was added the more important consideration of saving human life. Finally, it has been contended, that the owners of the ship in this case ought to be allowed their freight and general average, principally on the ground of

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their having precipitated a sale of vessel and cargo, so as to deprive the owners of an opportunity of tendering salvage, and proceeding on their voyage.

If precipitating sale is any ground of complaint, it is obvious that it can only be made against the district court, and not against the salvor. I am fully aware, that great and unnecessary loss to owners may be produced in such cases, as salvage can be as well ascertained by appraisement as by sale. But if a court has unadvisedly been led to order a sale in such a case, it is as against the salvors, *damnum absque injuria*. Freight and average can with no propriety be charged upon salvors, as both the freight and the average are equally the result of the efforts in saving the ship and goods. That claim, therefore, must be wholly rejected.

Upon the whole, I shall decree to the salvors the one-fourth of the net proceeds of the vessel and cargo, and hesitate while I do so, under an apprehension that I have given too much. This will amount to more than twenty-one thousand dollars; of this sum let four hundred be paid to the pilot boat Opposition, and in the distribution of the balance, I adjudge one third to the Margaret, her freight cargo and crew. The remaining two thirds to be divided into twenty-four parts, and distributed as follows: to Fisher, eight parts; to Beach, one part; to the five free seamen, and the owner of Perry the slave each one part. In distributing the one third assigned to the Margaret, let the sum be also divided into twenty-four parts, sixteen of which are to be divided amongst the owners of the vessel, cargo, and freight, according to their relative value; in which distribution, let the vessel be valued at three thousand dollars, the freight at four thousand, and the cargo at the rate which Fisher himself fixes the value in his testimony, valuing those articles to which he does not testify at the advance proved by him on others. The reason for adopting this mode of fixing the value of the cargo is this: the result is unfavorable to Fisher, but he cannot murmur at it, as it is founded on his own testimony, and Johnson, the owner, being on board, and having consented

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to the undertaking, is certainly entitled to salvage. In distributing the remaining eight shares of the Margaret's third, it is right that Darrel the second mate of the Sybil, should participate. He was entered mate to the Margaret, and, what I attach more importance to, he appears to have been desirous of remaining by his own ship. Kennedy is also entitled to some distinction in this division. Let Wilson then have three parts, Darrell one part and a half, Kennedy one part, and the balance be equally distributed among the remainder of the Margaret's crew. The balance of the proceeds must be distributed among the claimants according as they shall prove interest. The claims of freight and average, even as between vessel and cargo, I wholly reject, as the abandonment put an end to the contract, and I consider the salvage paid by the freighters as a substitute for both freight and average. The decree of the district court (that decree awarded fifty per cent. salvage) is thus revised, and annulled so far as it is inconsistent with this decree, and the register will report to this court such evidence relative to interest, as will enable it to make a final order of distribution after paying all costs, which are to be charged upon the entire amount of the sales.

As to the specie, which it appears was taken from the Sybil and saved in the Margaret, I think it not necessary to make any observations respecting it, as it does not appear to me to be at all subject to our jurisdiction. Had any thing improper been done respecting it, we should have enforced such terms upon the salvors as would have been consistent with equity and good conscience; but nothing with this view appears to require the interference of this court.

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In the United States Court, District of South Carolina. In Admiralty. July Term, 1858.

R. MORRISON & Co. v. CARGO OF THE BRIG UNICORN.

The construction and legal effect of the terms, loss, average, and salvage in maritime contracts.

The facts are fully set forth in the opinion of the court.

MAGRATH, J. The argument in this case relates exclusively to the construction of certain words in a maritime contract, between the libellants and the master of the brig Unicorn, in the port of Havana. By the written obligation, the sum loaned was £1,622 17s., 8d., sterling, at a premium of twenty-five per centum; its payment secured by the block, the cargo and freight, of the brig. She sailed from Havana to a port of discharge in the kingdom of Great Britain, calling at Queenstown for orders; put into the port of Charleston from stress of weather; was surveyed, ordered to be repaired, and then sold. The validity of the bond is conceded. The holders have libelled the cargo, which has been sold under a decree; and the proceeds of that sale, except so much as has been paid at the instance and with the consent of the proctors, the costs and other charges, now remain in the registry subject to the order of the court. That part of the contract submitted for construction, is the following clause: "In case of loss of said brig Unicorn, such an average as by custom shall have become due on the salvage." The amount in the registry is not sufficient to pay the principal and maritime interest due to the libellants. And it is now contended that the libellants are not entitled to receive the whole amount, but only a proportion; to be determined by the ratio which the loan (whether with or without maritime interest is not stated) bore to the value of the ship, cargo and freight, at the time of her departure from

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Havana. The argument was made to rest principally upon the opinion expressed in 2 Arnold on Insurance, p. 1208, in which he refers with approbation to the argument of Valin, and the Article 381 of the Code de Commercio, Liv. 2, Tit. 9.

There cannot be much doubt of what was the rule of the general maritime law. In the 18th article of the *Ordonnance de la Marine*, it is laid down: "*S'il y a contrats a la grosse et assurance sur au meme changement le donneur sera preferé aux assureurs sur les effets sauvés du naufrage pour son capital seulement.*" 2 Valin Comm., 20. The lender in such a maritime contract would recover in preference to the insurer, the principal sum; but not the maritime interest. And this rule is supported by Emerigon, who assigns as the motive of the preference, that the lender contributes directly and physically to the existence of the effects put at risk; whereas the insurer is a simple guarantor who inspires courage, it may be, but does not procure or furnish the thing itself. The lender, he adds, acquires, in the commencement, a lien on the thing put at risk; and it cannot be annulled by the alienation, which an abandonment subsequently works towards the insurer. Emer. on Ins., ch. 17, sec. 12. He is supported in this opinion by Pothier; but the rule is questioned by Valin. It is not necessary to enter upon that discussion which engaged these distinguished men. It was not directed, as this must be, to determine what is the law; a much wider field was opened in the consideration of what it should be. Valin tells us in his correspondence with Emerigon, that the latter submitted the question to the Admiralty, and it considered his argument consistent with common rights; but that the maritime law followed the response of the Roman emperor: *Ego quidem mundi dominus, sed Lex maris*, (2 Comm., 30.) Boulay Paty, (3 tom., p. 229,) says the Admiralty of Marseilles was influenced by the argument of Valin; and the Code de Commerce adopted his opinion in the article which provides in such cases a division of the property saved, between the lender and assurer, in propor-

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tion to their several interests. The interest of the lender being the principal sum without the maritime interest; and that of the assurer, the amount which he has agreed to insure. In a question of maritime law, the Code de Commerce is regarded as a collection of regulations, municipal in their operation: but the *Ordonnance de la Marine* is described by Chief Justice Marshall, as compiled with great care by the first civilians of the nation, and with a view not only to all the ancient codes which are extant, but also to the customs and laws of all the maritime states of Europe. 1 Brock R., 399.

In this case I cannot discover the authority upon which, in the United States, that construction can be supported which maintains a division of the property saved, where it is insufficient to repay the lender the sum advanced. The terms in which the rule is recommended by Mr. Arnold plainly show that he did not understand it as adopted in Great Britain; and I think it equally clear that it never has been adopted in the United States. In 8th Pet. R., 553, Judge Story, when he pronounced for the validity of the bond, added, as the legal consequence, that it must be upheld to the extent of the property pledged for its payment. The 18th Admiralty Rule provides that, in all suits on bottomry bonds, they shall be *in rem* only; unless the master has, without authority, given the bond, or by fraud or misconduct avoided it, or subtracted the property, or unless the owner, by his misconduct or wrong, has lost or subtracted the property; in which case the suit may be *in personam*. And this rule is declaratory of the rule of the general maritime law, as enforced in the United States. The nature of, and the obligation arising from, these bottomry contracts, are well understood. In 1 Curtis R., 341, Judge Curtis says, "this is a contract of a peculiar character, distinguishable by very marked characteristics from an ordinary loan," and cites the language of Pothier that "it differs from all other contracts and forms a particular species by itself;" and that, also, of Boutay Paty, that "it is a contract having a specific name and character to itself."

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In *Pope v. Nickerson*, 8 Story R., and in *The Draco*, 8 Sumner R., 158, Judge Story has thoroughly examined these contracts, and in the latter case, defines it, as a "contract for the loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risk to be borne by the lender." And this definition is in accordance with *Simonds v. The Atlantic Insurance Co.*, 1 Pet. R., 486, 3 Kent Comm., 362. This contract is received as of great antiquity, varying in terms according to the laws or customs of the places in which it is used, but having two great tests; the exclusion of the personal liability of the owner and the assumption by the lender of the risks of the voyage. The total exemption of the owner, except in the cases mentioned in the 18th Admiralty Rule, is illustrated in *The Nostra Senora del Carmine*, 29 E. L. and Eq. R., 572, where the cargo having been taken out on bail and the fund proving deficient because of certain claims which had been interposed, the court refused an application to cause the owners of the cargo to pay in a further sum, the amount of the bail being assumed as the value of the cargo.

If the rule of an exemption of personal liability be so positively enforced, it is not obvious why the protection of the lender should not be equally considered, so far as it can be accomplished, by the application of the property to the debt, which it has been pledged to secure. These contracts are not forbidden; and although, as we shall presently see, subjected by Valin to severe criticism, are, nevertheless, with the guards placed around them, considered as important agencies in the advancement of commerce. Their operations may be controlled by the parties in the introduction of stipulations which modify, or, perhaps, wholly change them. In this case, then, if the parties to this contract have introduced conditions which qualify or limit the rights they otherwise would have had, they must submit to that consequence; every contract, as a general rule, is a law for the parties to it. By this contract, the brig Unicorn, freight and cargo, are assigned over for the security of the loan taken, by the master, and shall be

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delivered to no other use or purpose whatever; until payment of the bond be first made with the premium which may be due thereon, the time of payment is specified, and then follows the condition, in case of loss of the said brig Unicorn, such an average as by custom shall become due on the salvage.

Before I proceed, however, to the consideration of that part of this clause, which has been argued, there is another which requires also consideration. What is to be understood by the words "in case of the loss of said brig?" The construction of the other parts of the sentence succeeds that, which is the proper understanding of these words. The case of *The Elephanta*, 9 E. L. and E. R., 553, is a leading case upon this point. In that case the bond provided that if the vessel and her cargo should be lost, miscarried, or cast away, the sum loaned and the interest should not be recovered. By stress of weather the ship was forced into Algoa Bay; was surveyed, and found to require considerable repairs. For these repairs advertisements were made; but the attempt was unsuccessful, and the vessel was abandoned for a total loss. Part of the cargo was sold, and the proceeds remitted to London, and part was re-shipped and reached England. Dr. Lushington, after commenting upon the little aid he had received from adjudicated cases, proceeds to examine the terms, lost and miscarry; cast away, of course, had no application to the case. The explanation of "loss" he derives chiefly from the case of *Thompson v. The Royal Exchange Assurance Company*, 1 M. and S. R., 30, in which Lord Ellenborough held, that while the ship existed in specie, she was not lost; and although the expense of repairing was ruinous, yet she was not lost within the meaning of the bond, if existing in specie and capable of receiving repair. Accordingly the bottomry holder was held to be entitled to the goods re-shipped to England and the proceeds of those sold at Algoa Bay. In *Joyce v. Williamson*, referred to in Park on Insurance, 463, (reported in 26 E. C. L. Rep., 67,) the bottomry bond contained a clause, that if the vessel should be

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taken by the enemy, cast away, miscarry or be lost, before her safe arrival at New York, it should be void. The vessel was captured by a privateer, retaken, and carried into Halifax, where part of the cargo was sold for salvage and repairs, and she afterwards arrived at New York with the remainder of her cargo.

The vessel was worth the amount of the bond, but not that amount with the repairs added to it. Lord Mansfield held the taking, not a loss intended by the bond; and the lender not liable for average or salvage. In the *Catherine*, 1 E. L. and E. R., 679, the same rule is laid down; and the circumstances of the case are so similar to those in the case before me, that its decision would be sufficient authority to guide me to a conclusion. In *Pope v. Nickerson*, 3 Story R., 487, the rule is laid down with great clearness. "The bottomry holders," says Judge Story, "undertake the risk of the voyage and that the schooner shall be able to perform it, notwithstanding the enumerated perils which in the present case were fire, enemies, pirates, and other dangers and casualties of the sea and rivers. But they do not undertake that the vessel shall be able to perform the voyage without any repairs, and without any retardation: but only that the dangers and casualties of the sea and rivers, and the other perils shall not of themselves defeat the voyage. They are to be paid their money unless the voyage is defeated by such dangers and casualties, or other perils, and these alone. The case is not like that of an insurer, where the underwriters are liable for a particular loss, or for a total loss, either in fact or in a technical sense. In cases of bottomry there can be no such thing as an abandonment by which a loss not strictly total can be turned into a technical total loss." In *Simonds v. Hodgson*, 8 B. & A., 41; 23 E. C. L. R., 29, it was held that the bond might provide for the arrival of the vessel to any port, if she was unable to reach the port of final destination.

In the argument here, the case was rested upon a ground which would be applicable to an insurer. But the claim made is that of an owner; and there is no proof of any

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insurance. If there had been, no proof is before me of abandonment and acceptance. The argument of Valin is exclusively applicable to an insurer, and does not seem to have been considered by him as applicable to the case of the borrower. Recurring, then, to the construction of the "loss" in this case, it will be seen that the loan was made in Havana, in consequence of the damage which the brig had suffered. She was repaired, sailed from Havana, again experienced stress of weather, and came into the port of Charleston, where she was surveyed, and certain repairs recommended. She was not repaired; the estimates are said to have been too high. A sale was recommended in consequence of this; and it was made. I will not say how far these circumstances, as against an insurer, may be sufficient to make this constructively a total loss; but they do not constitute certainly a loss within the meaning of the bond. 3 Story R., 487; 29 E. L. & E. R., 553. And I cannot find a better introduction to the reasons which support this conclusion, than in the language of Dr. Lushington: "If (says he) I should hold that the bottomry holder cannot recover under the existing circumstances, I apprehend that it must follow that no suit can be successfully maintained upon a bottomry bond where the ship was disabled from prosecuting her voyage; or the owners had a right and chose to abandon her; though the whole cargo may have been transhipped and brought in safety to the port of destination."—C. E. L. & E. R., 555.

The lender, in this case, had for his security an assignment of the brig, cargo and freight. If there is to be an apportionment as contended for, by the terms of the bond, it is confined to the loss of the brig. That a loss of the vessel, is not a loss of the cargo, so far as the security to the lender is concerned, is seen in *The Elephanta*. Here the vessel has been sold, and the proceeds are in the hands of the borrower or his agents. It is true that it is said, these proceeds have been applied to the payment of expenses. But I do not know anything of these expenses, and must hold them, therefore, to be such as affect the borrower. The

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cargo is not lost, or damaged, although the voyage is broken up. And the voyage is broken up, not because the cargo may not be transhipped, nor because the vessel may not be repaired; but because it is not profitable to the owner to do the one or the other. Can this, in any just sense, be termed "a loss?" If so, is it a loss from any of the perils or casualties which the lender in the bond consented to undertake? When the lender undertakes the risk of the voyage or the perils of the sea, it is a misapprehension to suppose that he does so for the benefit of the borrower. He is an insurer, not for the borrower, but for himself, to the extent of his loan. In fact, the borrower, to the extent of the loan, has no insurable interest; so perfect is the transfer, to the extent of the loan, that the lender may insure, but not the borrower. The personal liability of the owner is excluded, and the pledge of the thing, vessel or cargo, or both, substituted. If it is lost, the debt is not paid. But its arrival is not, if we speak with precision, the condition upon which the debt is to be paid; although it is a risk which, if it occurs, will defeat the payment. In contracts not of a maritime character, the lender may also bind himself to look to a certain security, and forego his personal action against his debtor; and if the security fails or is insufficient, his debt is lost, because he has no remedy.

In the same manner in these contracts, a loss of the thing pledged is a loss of the debt, because it is a loss of that to which the creditor agreed to look for payment. But this "loss" is the destruction of the property pledged, or its damage to a degree inconsistent with reparation. It is a loss, in fact, not by construction; and that loss occurring from the perils or casualties referred to in the bond. The obligation of this contract is as sacred as that of any other, and the general rule applies to this, that neither party can modify the terms or affect the rights of the other party, unless by consent. By this rule, as we have seen, Emerigon is guided in the denial of the right of the insurer to participate with the lender, because the abandonment by the insured, if it gives the insurer a share with the lender, is a variation of

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the contract, and affects the rights of the lender by circumstances occurring after the contract is executed, and for which no provision is made in the contract itself.

But open as is the argument for a participation in these proceeds, to this objection now stated; and which is an objection applicable to all contracts; yet perhaps to none would it be more productive of injury than the particular contract now before me. It begins by affirming a power in the borrower to deny the lender the benefit of his security, because it was constructively lost; although it actually existed in specie. This constructive loss results from the wishes and actions of the borrower, or his agents, and from it would arise benefit to the borrower and damage to the lender. He who before a constructive loss, was postponed to the lender, after he had made that loss, would participate with him. He who before that loss was entitled only to the whole. Such a rule would involve a temptation to error, which in too many cases would be most urgent. In this case I have not any evidence, which suggests a suspicion of *mala fides* in the sale of the vessel; nor have I any evidence that its sale was necessary.

The repairs for which the bottomry bond was executed, had only been made within a recent period. The vessel had encountered heavy weather, but she was not disabled, and had not become unseaworthy. It may be true that the estimates for the repairs, which had been recommended, were high, and that the owners, if present, would have done precisely what the master did do. But, if so, I would have to ask, with Judge Story, upon what ground is the bottomry not to be paid? Shall it be held that in addition to all other perils assumed by the lender, that of the convenience or profit of the borrower shall also be assumed? "It was a duty (says Judge Story) which the owners owed the bottomry holders, if the schooner could have been repaired so as to perform the voyage, to have made the repairs." (3 Story R. 478.) I can only regard the sale of this vessel as an act terminating the voyage, dispensing with the time and place mentioned in it for its payment, and entitling the

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lender at once to proceed to recover the sum loaned. *The Draco*, 8 Sumner R., 194. But assuming it to be otherwise and that the vessel was in fact lost, the argument that the lender must divide with the borrower seems to me to be wholly untenable. If it is to be so in case of loss, by the terms of the bond it must be confined to the vessel. That sale was made by the master, and the proceeds are held by the agents of the owners. It has already been seen that even where the cargo was mentioned in the bond, and the ship was sold, the cargo was adjudged to the lender. The principle laid down by Emerigon, that "the borrower can claim nothing from the effects saved, until the lender be satisfied," and that "the creditor never comes into apportionment with his debtor on the thing which is the pledge for the payment of the debt," is of obvious force and universal application; and if any case has been decided in Great Britain or in the United States, which can be considered as sustaining the principle contended for in this case, I have not seen it. The right of an insurer to participate has been maintained with great zeal; but they who denied this right of the insurer, did so upon the ground that he represented only the rights of the borrower; and they who maintained his right, denied that he should be considered as representing the borrower, but insisted that he should be regarded to the extent of his insurance as having contributed to the enterprise. Indeed, the argument of Valin is addressed to a consideration of the superior claim of the insurer over the bottomry creditor as an efficient and indispensable instrument in developing the extension of commerce; and his argument in part is specially rested on the ground that the increase of maritime loans with the heavy rates of interest attached to them, would extinguish it. This argument, however, is wholly inapplicable to the case of the borrower; and I do not know that in the objection which he makes to a bottomry contract he is at all supported.

In adopting the conclusion, that in this case, there has been no loss within the meaning of the bond, I might omit all reference to the other part of the bond to which the

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argument was specially addressed. Perhaps, however, it is well that I should express my opinion of the proper construction. "Average," in this connection, means proportion; "Salvage" here, signifies the thing saved. The average of the salvage is the share or proportion of the property saved. Such an average as by custom shall be due on the salvage, is such a proportion as by the custom or law of a place, is due out of the property saved. And the intention is simply to declare, that in case of loss, the property saved shall be divided according to the law or custom of the country, if there shall be a law or custom prevailing upon the subject. (Jacobsen.)

In this case if the vessel exists in specie, I would not hesitate, upon a proper application, to give the lender the benefit of it, as a part of his security. I entirely concur with Dr. Lushington, "that the general maritime law of the world is directly opposed to the sale of vessels in the manner in which this has been done, and to the consequences attempted to be engrafted upon it." Nor am I disposed to favor this summary proceeding to confer a title against owners, and extinguish all claims and liens which may exist against a vessel. When such consequences are to result, it is proper, if it is practicable, to obtain a decree of a court for the protection of the owner and creditor whose title and lien are sought to be extinguished.

District Court, District of Maryland, October 29, 1879.

CLARENCE HOLLYDAY *v.* THE STEAMER DAVID REEVES.
ANNA E. KEENE *v.* THE STEAMER DAVID REEVES.

Steamer held in fault in not having a look-out and having failed to observe the lights of a sailing vessel.

Held, that a person who was unfitted for his ordinary business by the nervous prostration resulting from the fright and anxiety consequent

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upon a collision, but who had suffered no bodily hurt, could not recover damages.

Held, that in the Fourth Circuit, since the decision of Ch. J. Chase in the *Sea Gull* (Chase's Dec., 145,) it is settled that damages can be recovered by a libel *in rem* in the admiralty for the wrongful death of a person independent of statutory remedy.

Held, that where a widow filed a libel for damages resulting from the wrongful death of her infant son, who had never been in the habit of contributing money or services for her benefit, the damages were to be confined to the pecuniary value of the services or net earnings of the son during his minority.

IN ADMIRALTY.

MORRIS, D. J. These cases arise out of a collision between the steamer David Reeves and the sailing yacht Curlew, and were by agreement of counsel heard together, and upon the same testimony.

The collision occurred on the Chesapeake Bay just off the mouth of the Chester River, near Love Point Light, about 10 o'clock on the night of the 11th of August, 1879.

The yacht was intending to enter the river, having come up the bay from Oxford. The steamer had just come out of the river, and was on her way to Baltimore. There was a steam tug, the *Grace Titus*, with a barge in tow, two or three hundred yards nearly straight ahead of the steamer, and the yacht, having passed under the stern of the barge and across her course, soon afterwards came into collision with the steamer. The mate of the steamer, who was at the wheel in the pilot house, saw the yacht just before the collision, and had her engine stopped and reversed, and ported his helm so that the force of the blow was not great; and the only direct and immediate consequence of the collision was a slight damage to the hull of the yacht, which was subsequently repaired.

With regard to the primary question, which of the two vessels is to be held responsible for the collision, I have no difficulty.

The testimony of the persons on board the yacht, corroborated as it is entirely by the captain and mate of the *Grace Titus* and by the captain of the schooner *Gerkin*, has satis-

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fied me that the lights of the yacht were proper and plainly to be seen, and that she held her course.

The admissions of the claimants of the steamer and the testimony of their witnesses show conclusively that she had *no look-out*, and that the only persons on her deck giving any attention to her navigation were her captain and mate, both of them in the pilot house, both of them strangers to the bay and river, the mate indeed on his very first trip down the river.

This too at a time when the attention of those steering the steamer was particularly occupied in taking their vessel by a short cut over shoal water between the upper end of Kent Island and the Light House, very considerably south of the actual river channel.

It is useless to go into the details of the testimony, as under such circumstances, and coming out of the river where they were very likely to meet vessels, the absence of a competent and vigilant look-out actually attending to his duties was a fault of the *grossest character*.

I find nothing in the testimony that satisfies me that the yacht by any fault or omission contributed to bring about the collision. The deviation in her course as she passed under the stern of the barge was so slight that it was not observed at all by those on board the *Grace Titus*, and the whole testimony satisfies me that it was not sufficient to have altered her lights to the steamer.

With regard to the allegation that the side lights of the yacht could be seen across her bow, the weight of the testimony is that they could not be so seen, but that they were properly arranged.

It is true that the inboard screens of her side lights were only sixteen inches long instead of three feet, as required by the revised statutes, and this would be a most serious fault if there was evidence to satisfy me that the steamer could possibly have been misled by the lights of the yacht, but the weight of the testimony to my mind proves that neither the captain nor the mate of the steamer ever saw the lights of the yacht *at all* until they saw her green light

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just under the steamer's bow. The only effect of the shortening of the screens, if it did have any effect, would have been to show both lights when only one should be visible, as the proof is that both lights were shining brightly. How then could the want of proper screens have possibly misled the steamer when, as I think, the proof shows they never saw either? The dim red light which they speak of having seen could not, I think, have been on the yacht at all, and it seems very probable that it was the port light of the Gerkin.

I must therefore find the steamer to have been in fault and alone responsible for the consequences of the collision.

The first of these consequences was the injury to the yacht which was repaired at an expense of \$79.61.

The really important claims, however, for which these libels are filed grow out of other consequences which resulted from the collision, viz., (first,) the death of young Newton Keene who, being precipitated overboard by the careening of the yacht under the force of the blow, was in the darkness of the night most unfortunately lost overboard and drowned; (second,) the claim of Mr. Clarence Hollyday, who alleges that by reason of the nervous strain consequent upon his yacht being run down in the dark and the sad death of his young companion, who was his guest on board, he has been unnerved and unfitted for business and greatly disturbed in his health, sleep, and power to apply himself to any settled employment.

Both these claims give rise to questions of importance with regard to Mr. Hollyday's claim; it appears by the testimony that he was not scratched or hurt by the collision, and the only result to his body that he was sensible of was that for some days afterwards he felt sore and stiff in his limbs, but he has been going about as usual ever since. A witness, however, with whom he is connected in business, testified that since the collision (a period of about seven weeks) he had not given as efficient attention to his duties as previously, but no data were given and probably none could be given in such a case upon which to base any estimate of pecuniary loss.

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From the authorities I have consulted I think that in such cases as this the proper rule is to give no damages for fright or mental suffering resulting from mere risk or peril where no actual injury has been sustained. Such cases are *damnum absque injuria*.

The case of *Chamberlin v. Chandler*, 3 Mason, 246, referred to by counsel as indicating the proper measure of damages, was referable to a very different ground. It was a case of a female passenger who experienced great mental suffering by reason of the wantonly harsh and indecent conduct of the master of the vessel, his acts indeed amounting to an assault, but in that case the accepting of the passage money raised an implied contract that the passenger while on board should be protected from such treatment.

In no case similar to the one under consideration have I been able to find that damages have been allowed for the results of mental or nervous disturbance, where there has been no bodily harm sustained, and it seems to me that to hold otherwise would be to let in a class of claims, incalculable in numbers, which neither court nor jury could possibly estimate in money.

I am therefore of opinion that nothing is to be awarded to Mr. Hollyday beyond proper compensation for the damage to his yacht.

We now come to the matter of the claim of Mrs. Annie E. Keene arising out of the death of her son.

The question of the jurisdiction of the Admiralty in the United States to entertain an action *in rem* for such a claim was ably argued by counsel and was discussed with great learning and research. I listened with great pleasure and instruction to the discussion, but I do not think that in this court the question can now be considered an open one.

Upon appeal from this court, Chief Justice Chase sitting in the circuit court, decided the precise question in the case of *The Sea Gull*, (Chase's Decisions, 145), and held that damages could be recovered by a libel *in rem* in Admiralty for the wrongful death of a person, independent of statutory remedy. This was conceded to be contrary to

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the common law and to the Admiralty decisions in England. The question has never been passed upon by the supreme court, and their determination of it we cannot anticipate.

Meanwhile the decision in the case of *The Sea Gull* has been followed in subsequent cases in this court and by the district judge of New York in the case of *The City of Brussels*, 6 Benedict, 371, and by Circuit Judge McKennan, affirming a decree of District Judge Cadwallader in the case of *The Steamship Towanda*, 34 Leg. Int., 394; *Coggins v. Helmsley*, S. C. Vol. 5 Central Law Journal, 418, and more recently by District Judge Swing in the southern district of Ohio in *Rusk v. Steamboat Charles Morgan*, Am. Law Reg., Oct., 1879.

I therefore sustain the jurisdiction of the court to entertain the libel.

The next point then to be determined is what is the measure of damages to be applied to this claim.

The proof shows that young Keene was eighteen and a half years old, and therefore lacked but two and a half years of his majority. It appears that at the time of his death he was employed as a clerk and salesman in the city of Baltimore, and was receiving eight dollars a week salary. It was proven that from the manner of his living, his social position and the society he frequented, the actual cost of his maintenance, in dress, board and lodging and necessary incidental expenditures, could not have been less than \$500 a year. It would therefore appear from the proof that at the time of his death he was earning less by about \$100 a year than it was costing to maintain him.

His brother-in-law did testify that at the time of his death arrangements were about being perfected to establish him as the agent of the branch in Baltimore of a business about to be started in New York, and that large gains would have accrued to him amounting to perhaps \$1,000 or \$1,200 a year. But this was shown to be merely a hope and a sanguine expectation that might as likely end in failure as success.

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In this class of cases, whether brought under Lord Campbell's act in England or under similar acts in this country, it has been settled that only compensation for the *pecuniary* loss to the survivors is contemplated, and nothing is to be allowed for the sufferings of the deceased or the grief of surviving relatives or a solace for bereavement.

In a Maryland case (24 Md., 107, *Coughlan v. B. & O. R. R.*) it was decided where a widow sued for the damages resulting from the wrongful death of her infant child, that the law entitles the mother to the services of her child during minority only, that beyond this chances of survivorship, his ability or willingness to support her, and her mental sufferings resulting from the death of her child, are matters too vague to enter into an estimate of damages intended to be merely compensatory.

It is true that both in England and in some of our states it has been decided that damages are given not only with reference to a legal claim, but may also be calculated in reference to a reasonable expectation of pecuniary benefit extending during life. *Dalton v. S. E. Railway Co.*, 4 C. B., N. C., 296; *Franklin v. S. E. Railway Co.*, 3 Hurlstone & Norman, 211.

But in these cases there was proof to show that the person whose death was complained of had been in the habit of contributing money or services for the benefit of the plaintiff, and the jury were required to find that although the plaintiff had no legal claim on the deceased there was a reasonable expectation that the deceased would have continued to be able and willing in the future to contribute an equal amount of money or service. There was something therefore upon which to base an estimate of damage, and the jury was instructed not to make a mere guess but to be satisfied that there had been an actual loss of pecuniary benefit which might have been reasonably expected to continue if the deceased had lived.

There is undoubtedly difficulty in reconciling these restrictions of the amount of damage to be allowed with the reasoning of the supreme court in the case of the *R. R. Co.*

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v. *Barron*, 5 Wall., 90. In that case a passenger had been killed in a railroad accident, and the court would seem to hold that the whole matter of the damage to his next of kin must be left to the sound sense and deliberate judgment of the jury: a decision contrary to the usual tendency of courts to restrain the excesses into which juries are apt to run in such cases. It is to be noticed however that the case is based upon a statute of Illinois providing that the action shall be brought in the name of the personal representatives of the deceased, and the jury are directed to give what they shall deem a fair and just compensation for the pecuniary injury resulting from the death to the wife and next of kin of the deceased person, not exceeding \$5,000.

The circuit judge in his charge tells the jury that the policy of this law was evidently to make common carriers more circumspect in regard to lives entrusted to their care, and it is in that spirit that the statute was interpreted. But even in that case the jury were told that they were not to consider the pain suffered by the deceased or the grief of the surviving relatives, and that no damages were to be given by way of punishment. That they should consider the character, age, business habits, and means of the deceased, and whether such a man was likely to experience an increase or decrease of fortune if he continued to live, and that they might consider the contingency of his marrying and his property going in another channel.

So in this case I must consider all similar facts and contingencies with regard to young Keene, so far as there is proof upon which to base such consideration; and having done so and taking note of the expense of recovering and interring his body, but allowing nothing by way of punishment and nothing for the bereavement of his relatives, I do not find this to be a case of any considerable pecuniary damage.

I shall award to the libellant Mary E. Keene the sum of seven hundred dollars.

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[NOTE.—The inferior courts have almost unanimously decided that a libel may be maintained in the admiralty for a maritime tort causing death. See, in addition to the cases cited *supra*, *Cutting v. Seabury*, 1 Sprague, 522; *Holmes v. Railroad Co.*, 5 Fed. Rep., 75; *Transportation Co. in re*, 5 Fed. Rep., 599; *The Garland*, 5 Fed. Rep., 924. But see also *The Sylvan Glen*, 9 Fed. Rep., 335. In the cases of *Gordon, exp.*, 3 Morrison's Transcript, 483, and *Detroit River Ferry Co. exp.*, Id., 487, application was made to the U. S. Supreme Court to issue writs of prohibition to inferior courts which were entertaining libels for injuries resulting in death. The application was refused, on the ground that they would not allow writs of prohibition to take the place of appeals, whether the amounts involved were sufficient to authorize appeals or not. The court, however, did not pass upon the question whether the right of action survived.]

United States District Court, District of Maryland, Nov. 1, 1879.

ALEX. H. SCHULTZ v. EDWARD BOSMAN.

Although the rule is settled that usually the master has no authority to bind the owner for repairs or supplies furnished the vessel in a port of the same state in which the owner resides, *held*, that this restriction of the master's authority is not to be extended beyond the reasons giving rise to it. When therefore the port where the supplies or repairs are furnished, although in one sense a home port, is not the port where the owner resides, and he is not within easy access, and the supplies or repairs are necessary and not unusual in amount, and such as a reasonably prudent owner would have sanctioned if present, the owner may be held liable.

The vessel being a small schooner registered at Crisfield, Md., engaged in trade on the Chesapeake and lying in the port of Baltimore, her owner living in Somerset county, Md., and being in need of a pair of side lights, a fog bell and other absolutely necessary articles of equipment, and the master having no money nor credit, purchased them on the credit of the owner.

Held, that as the owner lived at a distance and could not be consulted

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without delay, and the said articles were required for the navigation of the vessel, the master had authority to bind the owner for them.

Held, that a private understanding between the owner and the master by which the vessel was considered between them as sold to the master, could not affect the rights of the libellant.

Held, that furnishing supplies and repairs to a vessel being a maritime contract, the admiralty courts have jurisdiction of suits *in personam* brought by material men against shipowners for such supplies or repairs, even when there is no lien on the vessel.

Libel *in personam* against owner of a domestic vessel for supplies purchased by the master.

IN ADMIRALTY.

MORRIS, D. J. This is a libel *in personam* against the owner of the schooner "Clara" of Crisfield, Maryland, to recover for supplies furnished the schooner by direction of the master while she was lying in the port of Baltimore; the owner being a resident of Somerset county, Md.

The sale and delivery of the articles for the payment of which this action was brought was fully proved; they were principally a pair of side lights and a fog bell furnished the schooner "Clara," and were articles necessary for her navigation, indeed without those just mentioned she would have been liable to serious penalties under the U. S. Revised Statutes.

They were purchased by the master upon the credit of the owner; and this suit is resisted upon the ground that the schooner being a vessel registered in Maryland was, when lying at Baltimore, in a home port, and that the master had not therefore authority to bind the owner for repairs or supplies.

It certainly has been held that the master has not usually authority to pledge the credit of the owner for necessary repairs made at the home port where the owner resides and can be consulted and can personally interfere, unless the owner has held out the master as having such authority or has ratified his contracts.

The reason of this is, that the foundation and nature of the authority of the master arises from the requirements of

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the peculiar and responsible duties of his position, and his authority must be commensurate with those duties; when the *reason* for his authority disappears, then his authority ceases. Therefore the authority of the master to bind the owners of the vessel is more extensive abroad than in a home port. In foreign ports (and ports of states other than those where the vessel belongs are for that purpose considered foreign ports) it is uniformly held that the master has authority to contract on the credit of the owner for such supplies and repairs as are reasonably fit and proper for the ship and the voyage. This authority arises from the necessity of procuring the supplies, the absence of the owner, and the presumption that if he had been consulted he would as a prudent man have procured them, and would not have allowed the voyage to be broken up or the ship to suffer for want of them.

It is only so far and just to the extent that the reason and necessity for such authority ceases in a *home* port that the authority of the master is restricted. It is no inflexible rule arising from statutory legislation or any question of jurisdiction, and the restriction should not be pushed further than the reasons of it require. When therefore, although the port where materials or supplies are furnished may be in one sense a home port, if it is not the port where the owner resides and if he is not within easy access of it, and the repairs or supplies are not unusual in amount and are such as a reasonable and prudent owner would have sanctioned if present, I think the master must be held to have power to bind the owner. Of course the supplies and repairs which are reasonably fit and proper under such circumstances for the master to contract for upon the credit of the owner without consulting him are much more restricted as to kind and amounts than would be the case in a foreign port, and greater caution and inquiry in giving the credit should be exercised by the material man before furnishing them.

In the case under consideration the owner lived at Crisfield—a place not of easy access from Baltimore, and the

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supplies were such as were indispensable to the navigation of the vessel, and they were furnished on the credit of the owner, the master having no credit. They were not provisions to be consumed by the crew, but articles which went to the equipment of the vessel, and the owner presumably got the benefit of them.

It was suggested by the respondent that he should not be held liable as owner of the vessel because he had agreed with his brother, who was master, to sell the vessel to him; but it is conceded that he continued to be the *registered* owner and that his brother not being able to pay for the vessel, the agreement of sale was subsequently rescinded between them, no change having been made in the *registry*. Having held himself out to the public as owner, and having put in his brother as master and suffered him to remain without notice of any change, no such private understanding between them which they could set up or rescind at pleasure and without notice to anyone, can affect the rights of the libellant.

In the argument of this case a question has been raised as to the jurisdiction of this court to entertain an action *in personam* for such a cause of action where there is no privilege or lien *in rem* on the vessel. It was argued with great earnestness and with many references to authorities, and as the question is an important one, applying to many cases pending in this court, I have considered it with care, although I never supposed there could be doubt with regard to it at this day. It was asserted that by decisions with regard to jurisdiction of admiralty courts and particularly by Dr. Lushington, the doctrine had been established that no suit could ever be maintained against the ship if the owners were not personally liable, and *vice versa* that in no case where the ship was not liable could the owners be held *in personam*; and that this doctrine had been recognized by the supreme court in the changes they have from time to time made in the 12th Admiralty Rule, and by the opinion delivered by Mr. Justice Johnson in *Ramsey v. Allegre*, 12 Wheaton, 613.

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I do not find this proposition supported by the weight of authority in this country.

Mr. Justice Story, delivering the decision of the supreme court in *The General Smith*, 4 Wh., 438, says "no doubt is entertained by this court that the admiralty rightfully possesses a general jurisdiction in cases of material men, and if this suit had been a suit *in personam* there would not have been any hesitation in sustaining the jurisdiction of the court," and he then proceeds to dismiss the libel *in rem*, because being a domestic vessel the material man had no lien upon the ship.

In the opinion delivered in 1827 by Mr. Justice Johnson in *Ramsey v. Allegre*, (speaking for himself, but not for the court, they having put their decision upon a different ground,) he repudiates the doctrine just above quoted from the opinion of Mr. Justice Story, and in a most learned and lengthy discussion endeavors to establish the doctrine contended for by counsel in this case, but I do not find that his views have ever been sanctioned or approved by the court in any subsequent case; on the contrary, it is apparent that they have constantly taken for granted that such was not the law governing admiralty practice and jurisdiction in this country.

Chief Justice Taney, thirty-four years later, delivering the opinion of the supreme court in the year 1861, in the case of *The Steamer St. Lawrence*, 1 Black, 529, said: "In the case of a foreign vessel the repairs and supplies are presumed to be furnished on the credit of the vessel, but in the case of a domestic vessel the supplies are presumed to be furnished on the personal credit of the master or owner, and where the local law gives the party no lien he must seek his remedy against the person and not against the vessel. *In either case the contract is equally within the jurisdiction of a court of admiralty.*"

In 1874, in the case of *The Lottawanna*, 21 Wal., 559, Mr. Justice Clifford in his dissenting opinion says: "Contracts or claims for services or damage purely maritime and concerning rights and duties appertaining to commerce and

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navigation are properly cognizable in admiralty, and this without regard to whether by the maritime law a privilege or lien is given upon the ship or not, *and it is beyond dispute* that a contract for necessary repairs or supplies is a maritime contract whether the vessel was at home or abroad when the repairs or supplies were made."

I think it is clear that the action *in personam* is the general remedy in admiralty of the material man in all cases, he having also in certain cases and subject to certain limitations a further and more effective remedy by virtue of a lien on the ship. 1 Conkling Adm., 76.

The ground of the action is in the liability of one person to respond to another and the court may enforce it against the person or against a particular portion of his property or against his property generally as the law may have provided the right. Benedict's Adm., § 304. See also § 269 and 270.

One very great reason for denying the maritime lien or privilege on the ship in case of domestic repairs and supplies (unless given by the local law which usually requires notice to be given by recording) is that it is a secret lien and that the rights of persons who invest their money in the purchase or loan money on mortgages of such ships are put in jeopardy, but there is no such objection to a right of action against the owner *in personam*.

The very ground upon which a lien or privilege upon the ship is given in a foreign port is that the master was not able to procure the supplies upon the credit of the owner. If the claimant of a ship libelled by a material man can show that the master could have obtained the supplies and repairs on the credit of the owner and that the material man knew such to be the fact then the libel *in rem* cannot be maintained, but a libel *in personam* against the owner could be.

So far as I can find, although from time to time the attempt has been made to fasten such a doctrine upon the admiralty courts of this country, at no time has it ever been held that their jurisdiction is restricted to cases in which

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there is a right to proceed *in rem*. The quotations I have made from decisions of the supreme court show that whatever may have been at times the individual views of dissenting justices the court has always upheld the contrary doctrine.

It is an error I think to suppose that the 12th Admiralty Rule gives it recognition.

In the rule of 1844, the proceeding *in rem* was allowed in cases of domestic ships where by the local law a lien is given. The rule is silent as to the action *in personam*, but the action *in personam* was not forbidden. It was in fact constantly used.

By the rule of 1859 the proceeding *in rem* was disallowed and that is the whole effect of the alteration.

The rule of 1872, is general in its terms, giving to all material men, whether against foreign or domestic ships, their option to proceed either *in rem* or *in personam*.

But of course only where under the law in admiralty they have the right. The changes in the rule never proposed to give or to take away any right, but merely to declare that if the material man under the state law had a lien on the ship he might proceed or that he should not proceed to enforce it in admiralty.

The doctrine in this point declared by Dr. Lushington to be the law of the English admiralty courts as well as the other question to be decided in this case are fully discussed by Judge Shipman in the case of *Fox v. Holt*, 4 Benedict R., 294. He says, "Some of the articles charged for are of a character pertaining to what may be called the furniture and implements for necessary and permanent use on board the vessel. They were articles required for immediate use *and though furnished at a home port* it was at a place 20 miles distant from the residence of the principal owner.

Such articles immediately needed for current use I think the master could in the absence of funds in his hands obtain even in a home port at this distance from the owner upon the credit of the owner.

It is laid down by Dr. Lushington in the case of

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The Druid, 1 Wm. Robinson, 391, that no suit could be maintained against the ship if the owners were not liable, and that if the ship is not liable the owners are not, and *vice versa*. It is clear that the master can create no lien on the ship for repairs in the home port where her owners reside unless it is recognized by the law of that state; but can he not bind the owners personally?

The authorities are not uniform or consistent but they undoubtedly imply exceptions to the rule laid down by Dr. Lushington, and their general tendency is to support the doctrine that the owners are personally responsible for such repairs and supplies ordered by the master, as are reasonably fit and proper and apparently necessary to enable the vessel to navigate the sea and perform her voyage in safety, though obtained in a home port, and especially in one at some distance from that at which the owners reside."

I will sign a decree in favor of the libellant for the amount claimed and costs.

*United States District Court, Eastern District of Virginia,
at Norfolk, November 12th, 1879.*

WM. EDWARDS v. STEAM FERRY BOAT MANHASSET.

1. Steam ferry-boats crossing crowded harbors between fixed stations at regular intervals have not the exclusive right of way over their usual tracks or courses.
2. They are subject to the two laws of navigation requiring steamers to keep out of the way of sail vessels, and requiring steamers to slack up and, if necessary, to reverse their engines when there is danger of collision.
3. They must not merely try to comply with these laws, but must actually and effectively comply.
4. They must not move across crowded harbors at such speed that, if necessary, they cannot check up and stop in a space twice their own length.
5. Where injury happens to a person on one vessel from a collision with another vessel, the measure of damages as against the vessel in fault is:
 - (a) Expenses of cure.

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- (b) Compensation for loss of time and wages or earnings whilst disabled.
- (c) Compensation for pain and suffering endured.
- (d) Compensation for loss likely to result from any permanent injury inflicted.

LIBEL in admiralty for personal injury from collision.

Sharp & Hughes, for libellant.

Holladay & Gayle, for respondent.

HUGHES, J. On the 8d of June last the steamer *George Leary* was lying at Campbell's Wharf with her bow projecting about twenty feet beyond the eastern corner of the wharf, to a line with the spiles of the west side of the slip used by the Norfolk and Berkeley ferry boats. Just east of this slip and alongside of it lies the slip of the Norfolk and Portsmouth ferry boats. About twelve o'clock on that day a small sloop, the *Elizabeth Kate*, which had discharged a cargo of potatoes belonging to the libellant at the wharf, was pushed out by hand with sail half up from inside the *Leary*, past her bow, for the purpose of going over past the two ferry slips to Bell's Wharf, beyond. The wind was very light, and the sloop could and did make but very slow headway. It is the custom for the ferry boat for Berkeley to leave her Norfolk slip just when the Portsmouth ferry boat leaves Portsmouth for Norfolk. On this occasion, the *Elizabeth Kate* pushed out past the *Leary*, just after the Berkeley ferry boat left her Norfolk slip. She had on board her master, Colonna; and Edwards, the libellant, whose goods had just been discharged at Campbell's Wharf. The *Elizabeth Kate* failed to clear the slip of the Norfolk and Portsmouth ferry boat in time to be out of the way of the *Manhasset*, which was the ferry boat then coming across from Portsmouth. Some ten yards out from the end of that slip, the *Manhasset* ran upon the sloop, carried her before her into the slip, to within six or eight feet of the float, inflicting damage upon her to the extent of \$60. At the

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time of collision, Edwards the libellant was caught by the prow of the Manhasset against the sloop's mast, and his leg just above the ankle was quite severely bruised and injured. He was first taken to a station-house and treated there by a physician, and was afterwards taken to St. Vincent's Asylum, where he was confined with great suffering for several weeks, until sufficiently recovered to return to his home in Hampton. His ankle joint was painfully, and was at one time thought to be dangerously, affected; and is now the source of much pain, and is stiff, enlarged and the cause of more or less lameness.

The law of navigation applicable to this case is, that "When two vessels, one of which is a sail-vessel, are proceeding in such directions as to involve risk of collision, the steam-vessel shall keep out of the way of the sail-vessel."

Another law is, that "every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse." These are not merely prudential rules which steamers may apply as well as they can in an emergency, but they are *laws*, statute *laws* of navigation, admitting of no modification or variation; they must be implicitly obeyed, and, as has been over and over again decided, *effectively* obeyed. It was not, therefore, the duty of the sloop to do anything whatever, on this occasion; on the contrary, it was her duty to keep on, and abstain from doing anything. There is no proof in the case that the sloop made any manœuvre, or did any wanton or mistaken act tending to embarrass the steamer or to foil any manœuvre the steamer might have made in compliance with the laws of navigation which have been quoted. And this case, therefore, turns upon what the *steamer* did, in obedience to the law requiring her "*to keep out of the way of the sail-vessel.*" She did not keep out of the way of, but collided with, the sloop; and carried her after the collision some twenty yards or more into the slip. The only defense which she can urge in the case, (a defense however, which is not set out in the answer to the libel) is, that of "inevitable accident." But the weather was calm and clear; the

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hour was midday; the tide was in ebb; her machinery was in good working order; there was nothing the matter with her rudder or rudder-chain, or with her engine. There is no evidence of the existence of *vis major* in any shape. The case turns solely therefore upon the question, was there anything in the circumstances of the collision to excuse her for not having "kept out of the way of the sail-vessel?" This, the law imperatively commanded her to do; commanded her, not merely to *try to do*, but to do effectively and successfully; for the rule is too important to the interests of commerce and navigation to admit of any other compliance with it, than effectual, successful compliance. "How not to do it" as to executing a law of navigation so important and so imperative as this, is an idea which cannot for a moment be tolerated when it concerns the movements of powerful steamers in a crowded harbor like that of Norfolk.

In considering this collision, I shall rely chiefly upon the evidence of the master of the Manhasset Capt. Gregory. There was a great deal of evidence submitted at the trial, which was as violently conflicting as evidence in collision cases usually is. I shall take only his, as the best given for the defense.

Capt. Gregory stated, that when he got to a point 150 yards from the slip on the Norfolk side, he slowed down as he usually did at that point; that on doing so, he saw the sloop just come out from behind the bow of the Leary, making over towards Berkeley; that he then gave the signal to back his wheels; and at once did everything he could to stop his boat, and prevent her from running down the sloop. Now, if he had gone as far as ten yards beyond where he first slowed down which was at a point 150 yards from the slip; and if, according to all the testimony he collided with the sloop at a point ten yards from the slip, then he ran 130 yards between the point at which he first saw the sloop to the point of collision.

And the defense in this case, taken in connection with this testimony, is, that a collision by the Manhasset is inev-

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itable when, in the absence of any form of *vis major*, she sees a vessel ahead of her, after she slows down, at a distance of 130 yards. The consequences of accepting a defense based on this proposition, to the safety of shipping in this harbor would be so serious, that I dare not admit its validity. The usual speed of the Manhasset is at the rate of about eight miles an hour; and if it is true that her machinery has not power to check her up, and stop her in a distance of 130 yards, or more than twice her length, then either she cannot lawfully be employed in the harbor, or else her machinery should be changed.

And if it is true, as the testimony of all of those who were on board of her on the day of this collision establishes, that the crew knew she could not be stopped in that distance, then they were running the boat at an unlawful speed. For it is unlawful for any steamer to run in the harbor at such a speed, that on seeing a sail vessel 130 yards forward in her path, she must needs run into her by "inevitable accident." The law of navigation must be obeyed and the speed given up. It is to be observed, however, that he contradicts his own theory by testifying positively that he really could check up his boat in the space of 75 yards.

But even conceding that to be a fact (which I cannot believe is a fact) that the Manhasset cannot be stopped in the distance of 130 yards, and that her master knew that she could not, then her duty was to "keep out of the way," by going to one side or the other of the sloop; and the evidence shows that the course of the steamer was not in the least changed, nor any effort made to change it. If the Manhasset was so unmanageable that she could not be stopped in 130 yards, then her rudder ought to have been brought into active requisition and her course changed so as "to keep out of the way" of the sloop. I hold that the steamer was at fault and is responsible for the damages caused by the collision. Those sustained by the sloop are accurately ascertained, and a decree may be taken for \$100 in favor of her owner.

Those sustained by the libellant, Edwards, depend upon

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estimation by the court. The bills of the hospital and physician in attendance, must be allowed, and amount to \$90. Then, according to precedents, I am to fix the amount of damages due 1st, for pain and suffering; 2d, for loss of time and earnings while actually disabled; and 3d, for the loss likely to accrue as the permanent consequences of the injury, on the principles stated in my decision in the *Kirkland* case, 8 Hughes R., 641. I estimate the amount due for pain and suffering, which were very severe, at \$500. I also, on like considerations to those then stated, estimate the actual loss in wages and earnings during the season during which Edwards was laid up, at \$500. And I estimate the loss likely to be the consequence in the future of the diseased condition of his ankle at \$500. I will give a decree for an aggregate of \$1,590.

[NOTE.—On appeal this decision was affirmed by Hon. H. L. Bond, circuit judge, no written opinion, however, being filed.]

*United States District Court, Eastern District of Virginia.
At Norfolk, January 7, 1880.*

O. E. MALTBY v. STEAM-TUG R. R. KIRKLAND.

- *1. The proper place for a look-out on a tug is where he can best see forward, whether that be in or out of the pilot house. But unless the pilot house is proved to be the best place, a look-out taking his station therein subjects himself to suspicion.
2. Rules of navigation are *laws* requiring implicit obedience. They are to be observed not listlessly but effectively.
3. The rules requiring a steamer approaching a sail vessel to keep out of her way must be obeyed whether the sail vessel have her proper lights up or not, if the sail vessel is seen by the crew of the steamer in time to avoid collision; and must be promptly, energetically and faithfully obeyed. If in such case the sail vessel keeps her course and the steamer runs into her, the steamer is at fault, and must pay the damages.

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IN ADMIRALTY.

Sharp & Hughes, for libellant.*Ellis & Thom*, for respondent.

HUGHES, J. The schooner J. J. Housman set sail from Norfolk on the morning of the 8th September, 1879, at or about half-past one o'clock, on a fishing expedition to the Chesapeake Bay. Her crew was a captain, a mate, a man before the mast, and a cook; and she also had on board three fishermen, a book-keeper and one passenger. One of the fishermen, Roy Thomas, acted as look-out in the forward part of the vessel throughout the trip. This night was moonlight, but not bright; the moon had entered her last quarter, at 10h. 33m. P. M., on that night. There were frequent fleeting clouds. The vessel proceeded through Hampton Roads into the Bay, and at about 4 A. M., was moving in a northerly course, heading a little to the westward of York Spit Light, making eight miles an hour, with a fresh breeze from about southwest, when she came in collision with the steam-tug R. R. Kirkland, which struck her on her starboard side, forward of amidships, probably at an acute angle of about 30°, by which her hull was broken into, and she was sunk at the place of collision. The testimony of her look-out, Thomas, is positive and particular, that her lights were both up and burning brightly. The testimony of her master, Garrison, corroborates Thomas in so far as it asserts that the red light, which was the only one visible from her wheel where he was standing, was up and burning. The testimony of several persons on board of her is, that they saw the lights put up in good order and in proper position as the vessel was leaving Norfolk harbor at half past one A. M. On the other hand, the testimony of the pilot, the engineer and the fireman, on the tug, is equally positive, that when they came in sight of the schooner, one and one half to two minutes before the collision, they saw no light, especially on that side of the vessel not hidden from them by her sails.

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Just before the collision the tug was moving nearly due south at the speed of nine knots an hour; and shortly before the moment of collision, the pilot, Dougherty, had ported his helm. The master of the tug, Lowell, had about twenty-five minutes before, laid down in the rear part of the pilot house to sleep. He was aroused when the vessels were nearly in contact, and gave four bells to the engineer just at the time of the collision. The mate, Daniels, who was the tug's look-out, had been in the pilot house during the captain's nap, and would seem from the pilot's testimony, to have seen the schooner before the pilot saw her, one and one half to two minutes before the collision, and had given no signal to the engineer. The evidence of the men on the schooner is, that the night was light, but not bright. That of the men on the tug is, that it was dark, but not very dark.

I am to consider and decide the case on the statement I have thus drawn up from the testimony, variant as to the character of the night, and directly contradictory as to the question whether the red and green lights of the schooner were properly placed and burning. I will add, that the lights of the tug were as they should have been under the rules of navigation. I will premise that I have rejected the evidence of Sharrett as to what he saw as an expert when he went on board the Housman in the harbor at Norfolk on the night before his testimony was taken, (28th November, 1879,) on the point whether the lamps could be seen from the helm when up in their proper places. I will not say that under all circumstances I would reject such testimony, but it is of the character of hearsay, cannot be subjected to proper restrictions, and ought generally to be discarded. Though I consented at the hearing of the argument to treat as evidence the mere fact that Daniels, the look-out, who was not sworn as a witness in the case, made statements the day after the collision prejudicial to the respondents, declaring at the time that it would have little weight with the court, I have changed that opinion, and think all testimony as to Daniels' admissions after the collision,

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should be stricken out and disregarded. I have given them no consideration whatsoever in considering the other evidence. In regard to the question of the proper place for a look-out on a tug boat of the size and build of the Kirkland, I hold here, as I did in *The Kallisto* case, 2 Hughes, 142, that he ought to be at such moment just where he can best make proper observations as a look-out at that moment; whether it be in or out of the pilot house. I am inclined to think, from the evidence in this case, that the pilot house is as good a place for observation as any in a steam-tug; and shall not rule that Daniels, the look-out here, was at fault from the mere fact of being there in this instance. But in general, when the look-out of a steamer resorts to the pilot house, he subjects himself to the suspicion that he is there largely for his own comfort, and I do not think the courts will, or ought to, encourage the proposition that the pilot house, even of a tug, is the right place for a look-out. I come now to consider the case on that scant part of the testimony which is undeniable, and which I have embodied in the statement of the case which I have made above. The case turns upon the following *laws* of navigation. Before 1864, these were not laws imperative and binding upon navigators and courts; but were *rules* of prudence, recommended by the experience of navigators, and enforced in cases of breach more or less gross by the courts. They are now statutory *laws* of navigation enacted by congress, and by the legislatures of all commercial countries, which navigators are commanded to observe, and which courts have no option but to enforce, unless in cases coming clearly under rule 24, which allows a departure from them *only* where it is *necessary* to avoid immediate danger.

These rules of law governing the case at bar are as follows:

"Rule 20. If two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel."

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"Rule 21. Every steam vessel when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse," &c.

"Rule 22. Every vessel overtaking any other vessel, shall keep out of the way of the last-mentioned vessel."

"Rule 23. Where by rules 20 and 22, one of the two vessels shall keep out of her way, the other shall keep her course," &c., &c. The fact whether the schooner's sailing lights were up or not, being unascertainable from the direct evidence respecting the lights, the case turns upon other points affected by the rules of law just quoted.

The defense of respondents is, that when the schooner was seen, the crew of the tug saw no lights, and concluded that the schooner was moving in the same direction as themselves, that is to say, that the tug was "overtaking" the schooner. The tug's duty therefore was, under rule 22, to keep out of the way of the schooner; to do everything necessary to that end; and the question arises, did the tug do everything or do anything to ensure her keeping out of the way of the schooner. The testimony is, that she did not port her helm until just before, or strike her four bells until just at the time of the collision; although as the testimony also shows, she saw the schooner one and a half to two minutes before the collision. At a minute and a half before, the vessels, one of them moving eight miles and the other nine miles per hour, were 547 yards apart, yet during the interval, according to the account given by Dougherty, the tug's pilot, of what occurred; "Mr. Daniels (the lookout and mate) was sitting on the starboard side of the wheelhouse. I put my hand on the window to look out for Back River light. Daniels asked me if I saw the light plain. I said yes. Daniels asked me if I saw that vessel. I told him that I saw something like a vessel, a loom of a vessel. He then asked me if I saw a light, and I told him no. He then said, I can't see any light; and he had night glasses in his hands. He asked me if I thought which way she was going; and he said she must be going to the southward, the same as we are because I see no lights. So he stated to me

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to keep off inshore to go inside of him and give the right of way. I done so, and before we had time to get one move (of the wheel) the vessel was coming right across our bows. Mr. Daniels then called Captain Lowell from the lounge where he was lying or sitting, I don't know which, and Captain Lowell pulled the bell to back the boat immediately. As soon as the bells were struck, we were into the vessel." This same witness (the pilot Dougherty) says in another place, that the helm was ported about one minute—not exceeding two minutes—before the bells were struck. It is evident from this statement that Daniels had seen "that vessel" before Dougherty did, and called his attention to it; and that some conversation—apparently leisurely conversation,—had occurred between them before the helm was ported; and, further, that they were so slow in porting the helm, that the schooner "was right up across our bows before they had time to get one move of the wheel in porting."

Now, it seems to me from the foregoing, that on the supposition that the tug was "overtaking" the schooner, the men in charge of the tug, Daniels and Dougherty, did not do what they were bound to do in order to keep out of the schooner's way. The law requires that its commands shall be *effectively* obeyed. It does not tolerate a listless or tardy, imbecile obedience. And it is a cardinal canon of the admiralty law, that the rules of navigation, which it prescribes, must be effectively, promptly, energetically and faithfully executed.

There ought not to have been a collision in this case. The two vessels were in an open sea. Even if the vessel had not her sailing lights up (which is the question in dispute) the tug was bound to keep out of the way, if she saw the schooner in sufficient time to do so.

The absence of sailing lights could only have misled the tug as to the direction in which the schooner was moving; and on the hypothesis that the look-out and pilot of the tug were thus mistaken, the tug's own testimony shows, that she failed to do what was necessary effectually to keep out of the way.

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I take the case as it actually was; that of a steamer and sail vessel proceeding in such directions as to involve risk or collision. In that case the law requires the sail vessel to keep her course (Rule 23) and the steamer to keep out of the way of the sail vessel, (Rule 20.)

It is not denied, it is proved, that the schooner complied with rule 23. She did keep her course. The steamer, on the other hand, did not keep out of the way, but on the contrary ran into and sunk the schooner; and that in open sea, after the schooner had been seen for from one and a half to two minutes, seen when at a distance of from 500 to 900 yards.

The testimony of the tug's pilot is, that he could turn his boat around in the space of 100 yards; that in this case, he could have cleared the schooner in about a hundred yards; indeed, that he could have cleared the schooner in three points of the compass, that is to say, in three thirty-seconds of a complete circuit of 100 yards diameter. If then they saw the schooner one and a half to two minutes, or from 500 to 900 yards off, and yet ran into her; how can I be expected to hold otherwise than that the tug was in fault, and must be held for the damages resulting from this collision. I will so decree.

[NOTE.—See *The Tillie*, 13 Blatch., 514; *The Gray Eagle*, 9 Wallace, 505; *The Miranda*, 6 McLean, 221; *The Santa Claus*, 1 Blatch., 370; *Swift v. Brownell*, 1 Holmes, 467; *Chamberlain v. Ward*, 21 How., 548; *The Continental*, 14 Wall., 845.

On appeal to Hon. H. L. Bond, circuit judge, this decision was affirmed, except as to an item of damages which had not been contested in the district court. No written opinion was filed by the circuit judge.]

District Court of Maryland, March 24, 1880.

GREEN v. STEAMER HELEN.

- *1. In a collision case between a steamer and a vessel at anchor in which the testimony was hopelessly conflicting as to whether the vessel at anchor had a proper light up, both vessels were held in fault, the vessel at anchor because anchored in a channel in which a state statute forbade vessels from anchoring, and the steamer for running at too great speed in such channel; and the damages were divided.
2. A state law forbidding vessels from anchoring in a certain channel under penalty of forfeiting all right to recover in case of collision whilst so anchored, is, in the absence of congressional legislation, constitutional in so far as it prescribes where vessels may or may not anchor; but such a penalty cannot be enforced in an admiralty court.
3. The Maryland act of 1867 forbidding vessels from anchoring in certain parts of the Annapomess River was not repealed by chapters 151 and 409 of the Acts of 1872.

IN ADMIRALTY.

Handy & Hodson, for libellant.

Crisfield & Dennis, for claimant.

MORRIS, J. The allegations of the libellant are that his schooner, the Wm. H. Roach, 28 tons register, of Crisfield, Md., was, on the morning of the second of December, 1878, lying in the harbor of Crisfield, at anchor, in a manner not contrary to law, having on board 900 bushels of oysters; that about 5 o'clock A. M., while it was yet dark, the steamer *Helen* came upon her from the south-west, out of the usual track of said steamer, at a high rate of speed, and ran into and so damaged her that she soon filled with water and sank; that at the time a proper light, as required by law, was brightly burning in her forward rigging, which could have been easily seen, with proper vigilance, by those navigating the steamer, in time to have avoided the collision.

The claimant, by his answer, alleges that the steamer

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Helen, of 550 tons, was on her usual route from Baltimore to Crisfield, expecting to arrive at the railroad wharf at Crisfield on her schedule time of 5 o'clock; that the night was very dark, with occasional rain, and the wind blowing hard from the south-west; that the steamer was proceeding cautiously, at a rate not more than sufficient for steerage, with two men on the lookout far forward in the bow, one on each side, and with her captain and pilot in the wheel-house; that when on her usual course, about the center of the channel, and about 200 yards from the railroad wharf for which she was steering, the lights of two vessels were seen, one on her port and one on her starboard bow, but with ample room to pass between them; that when nearly abreast of the two lights the lookouts and officers saw the reflection of the steamer's head-light on the masts of a vessel under the steamer's bow, not more than 75 to 100 feet ahead, which afterwards proved to be the libellant's schooner *Roach*; that the engines were at once reversed, but there was not time to avoid the collision, although the headway of the steamer was checked, so that the blow was not violent; that the *Roach* was lying across the channel, and in the usual track of the steamer, and had no light upon her, and was so heavily laden that not more than a foot of her hull was above water, and the night was so very dark that it was impossible to have seen her sooner; that the schooner was anchored in a place forbidden by law, and although in a dangerous and forbidden place had no lookout or watch; that the steamer, knowing it was the constant habit and practice of the *Roach* and other vessels of her class to anchor in that part of the channel, although by law forbidden so to do, used every precaution to guard against accident, but that no seamanship on her part could have prevented the collision.

The first inquiry suggested is, was the schooner's light burning? It is proved that the lamp was a proper one, and was put up in a proper place. It was found after the schooner sank hanging in the fore rigging, and then had some oil in it and a good wick. There is testimony that it

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was seen during the early part of the night, and there is testimony that it was burning at the time of the collision, which I will briefly state :

Abel Riley, a colored seaman on the schooner De Bow, anchored next the Roach, about 30 yards off up the stream, says he heard the collision and came up on deck ; that none of the Roach's crew had then come up, and he saw her light, and that it was put out by the water when she sank.

Francis Powell, a seaman on board the Cuba, anchored about 40 yards down the stream from the Roach, came on deck and saw the steamer coming in, and watched her until she passed, and says that the Roach's light was burning. John Thomas Allen, a colored man, says he was on the railroad wharf waiting for the steamer, and saw the light from the wharf at about 4 o'clock. Thomas Conner says he saw it from the shore about 3 o'clock. James C. Simonson, assistant postmaster, says he was waiting for the steamer and saw the light at 5 minutes before 4 o'clock from the railroad ticket office. George C. Carroll, on board the Sailor's Delight, says he saw the light between 4 and 5 o'clock. Edward Evans, on board the schooner De Bow, says he saw the collision and saw the light. William L. Sterling was on the wharf and says he saw the collision and saw the light burning.

On the other hand, there were on the steamer two very competent men (one of them the mate) stationed, one on each side of the bow, near the stem, acting as lookouts. They saw the lights on the two vessels, one on either side of the Roach, but, although intently watching, swear they could see none on her, and could see none before or after the collision. The captain and pilot, although they saw the other lights, swear they saw none on the Roach, and so swears the man who was standing on the hurricane deck near the pilot house. The steamer was steered between the two lights, which, it appears, were the lights on the Cuba and the De Bow, because, as they say, it was a dark space in which there was no light. All these persons on the steamer testify that they saw the masts of the Roach as

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soon as revealed by the steamer's head-light, and all five of them testify that from the time the schooner's masts were revealed until she sank they could see no light on her. Charles Simmons, the watchman on the railroad wharf, who was standing in an excellent position for observation, watching the steamer coming in, and swinging a light for her guidance to the wharf, testifies that he saw the two lights on either side of the steamer and dark space between, into which she steered; that he then heard the crash of the collision, but saw no light of any vessel there.

As to all the libellant's witnesses who say they saw the light from the shore they were at considerable distances, varying from 500 to 1,000 feet. There were several vessels lying not far apart; their position had shifted with the wind, the darkness was such that they could see nothing but the lights, and they may easily have been mistaken as to which vessel the light was on. As to his other witnesses, their opportunities for seeing the light were no better than those of the officers and men on the steamer.

It is not necessary for me to discuss why I am disposed to give more or less weight to the statements of different witnesses who have testified with regard to the light; but I may say, generally, that it appears that there is such a state of feeling between the oystermen of Crisfield and those navigating the steamers running to that port, that the witnesses on each side of this controversy, whether on board the vessels that came in collision or not, would seem to be open to pretty much the same liability to the influences of bias and prejudice. The captain of the Roach was not on board of her, and no one had been since Saturday night, except five of her colored crew, who were sound asleep until roused up by the collision. Of these two were examined, but they did not say whether or not they saw the light when they came up on deck after the collision. In this conflict of testimony I find myself unable to arrive at a satisfactory determination of the question whether or not, at the time of the collision, the schooner's light was burning.

When, however, a vessel in motion comes into collision

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with one at anchor, the presumption is that it was the fault of the vessel in motion, unless the anchored vessel is in an improper place; so that, in the inconclusive state of the testimony with regard to the light, it becomes of great importance to determine where the schooner was at anchor, and whether she was lawfully there. The natural channel of the Little Annapessex River, on which is the town of Crisfield, was found insufficient for the steamboats and other vessels attracted by the railroad which terminates there. With the aid of appropriations from the general government the channel was dredged out so that now there is, from Tangier Sound to the railroad wharf at Crisfield, a channel about 800 feet wide and from 10 to 18 feet deep.

The legislature of Maryland expressed its sense of the great importance of preventing this channel from being filled up and keeping it free from obstructions to navigation by passing the act of 1867, c. 295, by which penalties are enacted against throwing into it any substances tending to fill up the river, and by which it is declared that it shall not be lawful to anchor any boat in said river between the railroad wharf at Crisfield and Tangier Sound, in the track of any inward or outward bound vessels, and imposes a fine of not less than \$20 nor more than \$100 for every such offense; further declaring that if any boat, while anchored in the river contrary to said act, shall be collided with and damaged by any inward or outward bound vessel, the owner thereof shall not be entitled to recover for any such loss, but said act and the violation thereof shall be a justification of such inward or outward bound vessel so colliding. This dredged channel is not of great length, and is in fact, more of the nature of a canal than a river. The danger of anchoring in it is apparent, and must have seriously impressed the members of the legislature, or they would hardly have thought necessary the extreme penalty which the act prescribes.

Much of the testimony of the libellants was directed to establishing the location of the Roach in the river at the

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time of the collision. I am satisfied that the Roach, on Saturday evening, cast anchor near the southeast edge of the channel, about 600 feet from the railroad wharf, and from 400 to 500 feet from Rice's wharf. The wind was then northeast, which caused the vessel to tend parallel with the channel, and down the stream. The Roach drew eight feet of water, and the proof shows that thirty feet eastward of the edge of the channel from this point the depth of water does not exceed six and one half feet.

As the captain of the Roach was very familiar with the river, and the depth of water, it seems hardly credible that he would anchor his vessel to remain from Saturday night until Monday in a place where, if the wind went around to the northwest, she would have grounded. I am satisfied she was anchored somewhat to the northwest of the edge of the channel. The wind changed on Sunday night, and at the time of the collision was blowing hard from the southeast, which tended to carry the Roach directly across the channel. The channel there is about 425 feet wide. The Roach is 50 feet in length, and her cable was 120 feet, so that even if anchored on the very edge of the channel she must have been lying about 170 feet off from it, across the channel, which would put her very nearly in the centre.

It is urged that this was not the usual track of the steamer, and that she was in the habit of coming in by a course further to the westward; but it could not have been much to the westward, and it would, I think, be unreasonable to restrict the steamer, on a very dark night, to pursuing her course within any such nice limits as that would imply.

I find, therefore, that the schooner was, in the language of the act of 1867, "anchored in the track of an inward-bound vessel, between Tangier sound and the railroad wharf," and that she was, therefore, unlawfully so anchored.

With regard to the application of the act of 1867 of the general assembly of Maryland to this case, two objections are made: *First*, that it is an unconstitutional attempt of the state to interfere with the powers delegated by the con-

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stitution to congress to regulate commerce among the several states. Undoubtedly it has been held that "commerce" includes navigation and every species of commercial intercourse, 9 Wheaton, 1, but it has also been held that, until congress does exercise the power given to it in such way as to manifest the intention to supersede or prevent state legislation, the states may, by law, prescribe such police regulations as are necessary to prevent the obstruction of its harbors and navigable waters, and the safety of vessels lying at anchor or moving thereon. These regulations have been held constitutional, and have been recognized by the admiralty as imposing duties on vessels which must be complied with. *The General Clinch*, 21 How., 184. In Cooley's Constitutional Limitations it is stated as the result of the decisions, that "the state has the same power of regulating the speed and general conduct of ships and other vessels navigating its water highways, that it has to regulate the speed and conduct of persons and vehicles upon the ordinary highway, subject to the restriction that its regulations must not come in conflict with any regulations established by congress for foreign commerce or that between the states."

I am of opinion that so much of the law as declares in what parts of the Annamessex river it shall not be lawful for vessels to anchor is a constitutional exercise of the rights of state legislation which the Roach was bound to observe.

As to the penalties prescribed by that act for violation of its provisions, they cannot be enforced in the admiralty. This court must apply to the case the general maritime rules applicable to a collision between two vessels, one of which is anchored in an improper place, not regarding so much of the act as declares that the vessel unlawfully at anchor shall in no case be entitled to recover for any loss resulting from a collision. *The Gray Eagle*, 9 Wall., 510; *Williamson v. Barrett*, 13 How., 109; *The Continental*, 14 Wall., 859.

The second objection urged to the act of 1867 is the con-

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tention that it has been superseded by the acts of the general assembly of Maryland of 1872, chapters 151 and 409. The first is an act to incorporate the town of Crisfield, and provides that the town commissioners may ascertain the depth and course of the channel of the harbor and river Annemessex, and fix buoys for facilitating the navigation thereof, and may cause the harbor to be cleansed and cleared of all obstructions, whether from vessels sunk or any other cause, and may require the wharves to be kept in repair. Chapter 409 is an act to define and preserve the harbor of Crisfield, and the Little Annemessex river in Somerset county, and provides that certain commissioners shall define and establish the lines of said river to which wharves and other improvements from either shore may be erected, and provides penalties for building in violation of such established lines, and for throwing into the harbor thus defined anything tending to fill up or obstruct the same.

Neither of these acts, so far as I can see, either conflicts with or supersedes the provision of the act of 1867, that no boat shall anchor in the track of vessels between Tangier sound and the railroad wharf at Crisfield.

It is not shown that, under either of the two later acts, any attempt has been made to set apart any anchorage for vessels. There was some testimony to show that an officer of the corporation of Crisfield had notified vessels that they must not cast anchor in the basin between certain wharves, but there was no evidence to show that the place where the Roach was lying had ever been, by any color of authority, designated as a proper anchorage for vessels.

I now come to consider whether there was any fault on the part of the steamer which contributed to cause the collision; for, although the Roach was anchored in an improper and dangerous place, the general maritime rule is that, whether the anchored vessel is in an improper place or not, the vessel in motion must avoid her, if practicable, and can only exculpate herself by showing that it was not in her power, by adopting any practicable precaution, to have prevented the collision. *The Clarita and The Clara*, 23 Wall., 14.

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It is admitted in the answer that the steamer was about 500 feet from her wharf in the harbor of Crisfield; that it was known to those navigating her that it was the constant practice of the Roach and other vessels of her class to anchor in that part of the channel; but it is alleged that she was proceeding cautiously and at a slow rate of speed.

Let us see how the testimony supports this allegation as to the rate of speed. The captain of the steamer says that when they saw the masts of the Roach, about seventy-five feet off, the steamer was going the usual speed which she maintains while coming up the river; that is to say, from six to seven miles an hour. Out on the bay, he says, they try to make ten miles an hour. The engineer says that on the bay they were making thirty-two revolutions of the wheel a minute, and on the river twenty-eight revolutions, and that at the time he got the signal to reverse, just before the collision, they had not slowed from the speed they had been making on the river, and were going, he thinks, six and a half miles an hour. The Helen is a side-wheel steamer, quickly stopped, and, even at her then rate of speed, was so far checked before striking the Roach that the direct effect of the blow was not great.

I am satisfied that if she had been proceeding at a slower speed the damage must have been very trifling. In my judgment, under all the circumstances and considering the obstructions they knew she was likely to encounter, she was maintaining too great a speed. The night was very dark. She was steering for her wharf. They knew that the harbor is very contracted, and that small vessels would very likely be in her track, and yet she had not slowed from the speed she had maintained the whole length of the river. *The Corsica*, 9 Wall., 684. In the harbor of Baltimore an ordinance provides that no steamboat of 150 tons and upwards shall proceed at a greater speed than ten revolutions of her wheel per minute, which serves to indicate the rate of speed which experience has shown to be safe in a narrow harbor in the day-time.

It results, from these considerations, that both vessels

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were in fault, and that the damages must be equally divided.

The steamer was not injured at all, so that the only damage to be determined is the loss sustained by the owners of the schooner. The libellant's itemized account of loss amounts to \$1,407. This exceeds in some of the items, what, in my judgment, is proper to be allowed. The 900 bushels of oysters are charged at 80 cents a bushel, but the proof is, I think, that their value, as they lay in the vessel, did not exceed 25 cents; this would result in a deduction of \$45. Two months' detention of the schooner is charged at \$600. Two months was, I think, an unnecessarily long time to be consumed in raising and repairing the schooner. It could have been accomplished in less than half the time, and I deduct \$300 from that item. This reduces the account \$345, leaving \$1,062 as the damage.

I will sign a decree against the stipulators in favor of the libellants for half that amount.

*United States District Court, Eastern District of Virginia,
at Norfolk, March, 29, 1880.*

JOHN FRAME v. THE SCHOONER ELLA.

1. A contract for "launching" a vessel which has been driven by a great storm, several hundred feet high and dry on the shore is a maritime contract, and may be made the basis of a libel *in rem* in admiralty.
2. An agreement to pay a definite sum as salvage for saving a vessel does not bar a proceeding *in rem* for the salvage.
3. In making a contract for "launching," the libellant did not imply or guarantee that he owned the dredges and machinery necessary to effect the launching; but only that he would hire and employ them as far as necessary to the execution of the work undertaken.

IN ADMIRALTY.

W. G. Elliott, for libellant.

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Ellis & Thom, for respondent.

HUGHES, J. By the extraordinary storm of August, 1879, the schooner *Ella* of Newcastle, Maine, was carried 1200 to 1300 feet beyond the ordinary water's edge, and beached high and dry on the shore of the Elizabeth river near Norfolk, far beyond the reach of the tides. The owner's agent rejected the offer of the Bakers of this city, experienced wreckers, to launch the vessel for \$1,200; and contracted at \$1,000 with a landsman, John Frame, the libellant in this suit, who had had some experience in moving houses. There was a written contract, at the price named, dated on the 1st of September, 1879, in which the libellant stipulated to "launch the schooner" and "to furnish all material, labor, and implements necessary to launch" her, and that the work of "launching" should be commenced as soon as practicable and without unnecessary delay. The agent contracted to pay for this service one thousand dollars, as soon as the vessel should be placed in deep water; and that he should not be liable to pay any portion of the sum until the schooner *was* placed in deep water. No time was agreed upon for executing the work; the libellant stating in evidence that he was unwilling to bind himself to any limited time.

The work was promptly begun about the 3d September, and the vessel was moved in a few weeks about the distance of twice her own length; she being a schooner of 160 tons. Then the plan of moving her over the ground seems to have been abandoned. It was determined, instead, to dredge a canal from the channel up to the place where the vessel then lay. For this purpose the dredge of one H. E. Culpepper was engaged, which went to work at fifty dollars a day, and worked on at intervals until she had earned 351 dollars. A good deal of delay seems to have been caused by the necessity of waiting for this dredge. On the 5th of December, the dredge, was again hired; Frame and Condon the master of the *Ella*, uniting with Culpepper in a written contract by which they pledged the lien of the vessel for the \$351 already earned, and for the wages to be

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earned. Under this arrangement the dredge again went to work, and, by the 22d of December, had run the canal up to the stern of the schooner where she then lay; and then knocked off from work; though it seems that a canal was dredged farther on along one side of the schooner at some time or other. Attempts were made to slide the vessel side-ways into this lateral canal; but they did not succeed. Then it was attempted to drag the vessel astern into the main canal; but the hawser used by Frame broke more or less often; and that effort failed.

Nothing seems to have been done by Frame after the 22d December up to the 4th of January 1880; which was probably due to the holidays. On the last named date, Condon told Frame that if he did not complete his job in a week from that time, he would terminate the contract. On the 11th January, Condon gave Frame a written notice that he had employed other persons to finish the work.

Condon, with his new employes, the Bakers, went to work; and, by cutting a canal on the other side of the vessel from that on which Frame had cut one; and, by the use of chains and other appliances, succeeded in launching the vessel on the 9th of March; that is, after the lapse of about two months from the time when Condon took the work out of Frame's hands. Condon paid the Bakers for the work done by them \$600. A libel was filed by Culpepper against the schooner for the dredging done by his dredge, in which he claimed \$750, including the amount of \$351 due for the first service which has been named. This claim and cost of suit, was settled out of court by Condon, and the libel dismissed; the court costs in which being about \$50. Frame contends that \$200 of this \$750 was not justly due; and that Condon should not have allowed it.

Frame now brings this libel, vouching his contract of September 1st and claiming the \$1,000 named therein, or else such just compensation for his services as may of right be adjudged to him.

A note has been filed by counsel for Condon since the

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argument at bar, contending that, as this is a claim for salvage, the libellant barred his right to sue *in rem* by entering into a special express contract for services.

There is nothing in the point made by the master's counsel. In some old cases it has been held that a special or express contract with the owners, fixing the compensation to be paid for salvage, was a bar to a libel *in rem*. But they have been overruled by more modern cases; and except as to contracts for fixed sums payable "at all events," such is no longer the law. The point was settled by the U. S. supreme court in the case of *The Camanche*, 8 Wall., 448, and the ruling there has been followed by several cases in the U. S. courts. Desty's *Shipping and Admiralty* is not, and does not profess to be, an authority itself; it is an index of *all* decisions in admiralty, some of which are authority and others of which are overruled cases.

The contract in the case before me, as I have said, was in terms a contract for *launching*. It was so in fact. The repairer of a ship still on the docks may libel her, either while there, or after she has been launched. Benedict says that towing or "otherwise moving" a vessel of commerce is a maritime contract, within the cognizance of admiralty. A leading case on this subject, and an early American case, is *Read v. The Hull of a New Brig*, 1 Story, 244. The present case is indisputably within the admiralty jurisdiction.

I come, therefore, to consider it on the merits. The claim is resisted by the master of the schooner, Condon, on two grounds:—1st, on the ground that the contract was forfeited by Frame by his failure to perform the job in a reasonable time; and 2d, on the ground that Frame was without skill in the business he undertook; and, furthermore, was not provided with the materials and implements necessary to the execution of his contract to furnish them.

Condon also insists that he lost at the rate of \$300 a month for all the unnecessary time that was spent by Frame about the work he undertook to do. As to this last objection, no cross libel has been filed setting up this claim; it is not a matter put in issue by the pleadings in the case;

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and I do not think this specific claim is properly before the court for adjudication. But even if it were, it would depend entirely upon the decision of the question of unreasonable delay which I am to pass upon.

Returning to the more regular grounds of defense made by Condon, and first to that of Frame's alleged dilatoriness in completing his work:—

It cannot be denied that Frame was bound to perform it in a reasonable time. The fact that no time was stipulated for, in a contract concerning the launching of a vessel of commerce, into which time always enters as a most important element of consideration, seems to indicate that neither party deemed it practicable to fix a time, and that the period to be allowed was left open to the determination of circumstances. I should have been disposed, nevertheless, to think the delay of four months quite unreasonable and fatal, but for what occurred after Condon discharged Frame and undertook the job himself. Frame had effected the removal of the schooner over the ground some two lengths, and thereby shortened the distance necessary to be dredged so as to save, according to Capt. Baker's testimony, six or seven days' work of the dredge. He had also dredged a canal from the water channel some thousand feet to the stern of the schooner, and extended it along one side of the schooner. He had thus accomplished most of the work necessary to the launching of the vessel, at the time he was discharged. Not much if any more than a hundred additional feet of dredging remained to be done, when Condon took charge. Yet two months elapsed after Condon set to work before he completed the job. If these two months were not an unreasonable time within which Condon did the remaining work necessary, it does not seem to me that four months were unreasonable for the much more considerable work that Frame had directed. The work was of a character to be attended by delays; and I do not see that the delays which attended what was done in the four months are beyond proportion with those which attended what was done in the two months when Condon had direc-

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tion, under circumstances creating the strongest incentives to exertion and expedition.

There is the further consideration, that Condon was in attendance at the schooner during the entire period of Frame's control, and does not from the evidence seem to have entered personal protest against the delay in any form, or even made complaint to Frame himself until the 4th of January. As late as the 5th December he sanctioned a proceeding of Frame by joining in the contract with Culpepper for the second use of the dredge, which recognized the original contract, and continued it in operation as long as the dredge should be employed; which was until the 22d December. This acquiescence and participation by Condon in what Frame was doing certainly affords a strong implication that there was no delay before that time to justify the forfeiture of his contract. Considered in connection with Condon's subsequent failure for two months to get the vessel off, when comparatively little remained to be done, I do not think there was such delay on the part of Frame as authorized a summary and arbitrary abrogation of the contract upon a week's notice. Solemn contracts cannot be set aside by a single party to them upon grounds so inconclusive. If Frame had himself thrown up his contract, he would have been bound by his contract, and could not have recovered any remuneration for his work and labor. But in this case, it is Condon who terminates it, and it does not accord with the spirit of a court of admiralty, which is averse to the exaction of forfeitures and penalties, to allow him, by his own arbitrary act, to fix a forfeiture upon the other contracting party.

The other ground of defense is, that Frame had no skill as a wrecker, and did not own the materials and implements necessary to the performance of his undertaking, which he contracted to furnish. There is no proof, and it is not a fact, that Frame held himself out as a professional wrecker. The evidence indicates, rather, that Condon knew he was a landsman, and that Condon employed him by reason of his having had some experience as a mover of houses

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on land. It is quite true that a man who undertakes work for a price impliedly stipulates that he has the requisite skill for its successful performance. But this rule is rarely if ever enforced, except in respect to professional skill, and that of experts in the mechanical trades and crafts. It does not apply to mere laborers or to employments non-professional and not within the mechanical trades. The launching of a vessel stranded by a phenomenal storm a quarter of a mile from the water's edge, cannot be held to fall within the experience of any particular profession or craft, and is as exceptional a work as can well be imagined. I do not think that Frame can be held to have contracted impliedly with Condon that he had any experience or special skill in the art and mystery of moving ships over the land.

This stipulation in the contract, that Frame should furnish the materials and implements necessary to the work undertook, bound him to defray the expense of procuring and using those materials and implements, and was not a false holding out of the idea that he actually owned and possessed them. Contracts of the sort, do not imply the ownership of such appliances. Men of enterprise often contract to do work requiring the use of herculean machinery immensely costly, which they do not own. They depend for procuring such materials and implements very often on nought but the *credit of the contracts* which they enter into. If in every instance they were held to own or to possess sufficient personal credit for procuring them, then men of enterprise alone and of no capital, would be unable to enter into any of the great operations of modern times, and the most important of these undertakings could not be prosecuted. The hiring by Frame and Condon of Culpepper's dredging machine the second time was upon *the credit of Frame's original contract*, which itself was a lien upon the schooner; and, Condon's joining in it attested that he considered the contract to be then in force and binding upon the vessel, and would continue so until the dredging for which it provided should be performed, *i. e.* until the 22d December; for

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otherwise he would not have signed the contract. I cannot agree that Frame's contract to furnish all the materials and implements necessary to the launching of the schooner, implied that he owned and could continually command a dredge, or even that he would have one ready for use on every particular day on which it could be used. It is clear from the tenor of the contract that each party contemplated that the schooner was to be got off by "*launching*." Dredging was not in the minds of either party. Nor does it seem to have come into their minds until after the lapse of several weeks in futile attempts at *launching*.

On the whole case, I think Frame is entitled to a just compensation for whatever effectual work he did for the schooner. He would be entitled to compensation for the dredging done by Culpepper; but, as Condon has paid that debt, it cannot now be awarded to him. He is also entitled to a proper compensation for moving the vessel from the spot where he found her, to that up to which the canal was dredged. I could not allow his actual expenditures in this part of his work. He may have spent double what it ought to have cost. I think the best way of getting at what this service was worth will be to allow him what the dredging of the canal up to where the vessel originally lay would have cost. Captain Baker says that that distance would have required six or seven days' dredging. This at \$50 a day, or \$300, is what I will allow.

A decree may be taken for \$300 and \$61.04 costs.

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*United States District Court, for the District of Maryland,
April 2, 1880.*

HOBEN *v.* STEAMER WESTOVER.

- A steamer approaching a sail vessel seeing her at some distance, and seeing her lights fluctuating must stop and, if necessary, reverse her engine until the course of the sail vessel is definitely ascertained, especially where the roughness of the sea and small size of the sail vessel may account for such fluctuation without supposing the sail vessel to have changed her course; and for failure so to do the steamer is solely responsible for the collision.

IN ADMIRALTY.

Mister & Bear, for libellants.

Barton & Wilmer, for claimants.

MORRIS, D. J. Collision between the schooner *Ella Kirkman* and the steamer *Westover*.

The libel alleged that on November 3, 1879, the schooner *Ella Kirkman*, an oyster puny of 26¹/₁₆ tons, laden with 800 bushels of oysters, was proceeding up the Chesapeake Bay, bound for Baltimore, her proper lights burning, the wind blowing hard from northwest, the schooner close-hauled on her port tack, steering northeast, making three to four knots an hour, under double-reefed mainsail and foresail, and bonnet out of the jib, when between 8 and 9 o'clock P. M., near the mouth of the Patapsco river, about a mile south by east from the seven-foot knoll, the look-out saw the lights of the steamer *Westover*, coming down the river towards the schooner, a mile and a half off; that the schooner kept her course, and when the steamer was close to her hailed and warned her off, but the steamer continued her course, and struck the schooner amidship, and so injured her that she sank in a few minutes.

The answer on behalf of the claimants of the steamer

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Westover alleged that the steamer was on her route from Baltimore to Norfolk, with her proper lights burning, a look-out on the forward deck, and her captain and second mate in the wheel-house; that when she reached a point half-way between the southeast buoy and the seven-foot knoll those in charge of the steamer saw the red light a mile and a half off, and immediately after saw both lights of the schooner one point on the steamer's starboard bow; that at this time the steamer was showing the schooner both of her lights, and the vessels were approaching nearly head on, and were about a mile and a quarter apart; that in a few minutes the schooner shut in her green light and showed her red, indicating that she had changed her course to the eastward; that when those in charge of the steamer observed this change, they changed the steamer's course to the westward; that in a few minutes the schooner shut in her red and showed her green light, indicating that she had changed her course to the westward; that the vessels were, at the time, about half a mile apart, and seeing this last-mentioned change the captain of the Westover ordered her helm hard a starboard; that when the vessels had approached within 200 yards of each other the schooner again shut in her green light and ran across the bow of the steamer; that as soon as the last change was indicated the steamer blew her whistle and reversed her engines at full speed, and made every effort to avoid the collision.

The answer admits that from the first moment of sighting the schooner's light the two vessels were approaching head on, and, therefore, from the first they were aware there was danger of collision, and that it was the duty of the steamer to take timely and effective means to prevent it.

The rule is well settled that if the lights of the sailing vessel are fluctuating, or for any reason there is uncertainty as to her course, the steamer must in time slacken her speed, and, if necessary, stop and back, and neither proceed nor change her course until the course of the sailing vessel has been ascertained. 17 How., 178; *Peck v. Sanderson*, 21 How., 6; *The Steamer Louisiana*, 5 Blatch., 256;

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The Illinois, The Harvest Queen, and The Adriatic, opinion of Chief Justice Waite, circuit court, S. D. of New York; *The Herman*, 4 Blatch., 441. A clearer case of admitted facts, requiring the observance of this rule, is rarely met with. When half a mile off the steamer had already witnessed four changes in less than four minutes in the lights of a sailing vessel directly ahead of her, yet she did not slacken from her speed of *nine* knots an hour, but continued porting and starboarding until within 200 yards, when at last, but too late, she reversed her engines.

That there was in the captain's mind great uncertainty as to the course of the schooner is apparent from his own testimony, and from that of the second mate, who was with him in the wheel-house.

In his testimony, after describing how he first saw the schooner's red light, and then saw both, and then saw her red light again, he says he then ordered his helm to port, and about as soon as they got the wheel over the schooner showed her green light, about 200 yards off. He says he then said to the mate: "She is either going about, or he has let her come up into the wind, and I told the mate" (not to slacken speed, as one would suppose, but) "to heave his helm hard a starboard." Next he says: "I could not see any lights, but could see her sails, and then I blew the whistle and gave the order to stop and back. I was then as far east as I could go without getting aground, and she was right under my bow."

The mate's testimony corroborates the captain's in every particular.

An examination of the testimony for the libellants very clearly shows why it was that the lights appeared so fluctuating to those on the steamer. The schooner was almost directly ahead, the water was very rough, and the small schooner consequently very unsteady, and the wind was blowing hard in flaws. She was trying to make the mouth of the river, and sailing as near to the wind as she could. To a vessel directly ahead her lights were liable to present a fluctuating appearance from three causes: *First*, the flaws

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in the wind; *second*, the plunging of so small a boat in a rough sea; and, *third*, the occasional obscuring of her starboard light by her jib. The testimony of Captain Morris, of the *Masonic Hall*, another oyster vessel, confirms this. He says that he, in company with the *Ella Kirkman*, had been anchored for shelter under the highlands of the *Magothy* river, and when the weather had moderated they got under way together to come up to Baltimore; that he was about half a mile ahead of the *Ella Kirkman*, and the steamer passed him a quarter of a mile to the westward of the seven-foot knoll; that it was blowing hard and the water rough, and he did not tack until abreast of North Point, and that there was no need for the *Ella Kirkman* to tack; that she was behind him, and he could see her red light, and that he could have seen both her lights, except her jib shaded her green light.

The evidence altogether is conclusive that the schooner did not change her course. The testimony of Mahon, one of the two look-outs on the bow of the schooner, was much commented on by counsel for the steamer. He says: "I saw the steamer's lights directly ahead, sometimes over the port bow, and sometimes over the starboard." This, I think, is satisfactorily accounted for, partly by the luffing of the schooner, as the wind varied, partly by her unsteady motion in the rough water, and partly by the changes made by the steamer in her own course, as she constantly changed her helm, and it does not prove any change of the schooner's course. It does not appear, therefore, that the schooner did not do all that was required of her by any nautical rule. It was her duty to keep her course, and it was the steamer's duty to avoid her, and the serious consequences which have resulted are to be visited upon the steamer alone. They serve to show the practical wisdom of the rule which requires the steamer in every case of uncertainty with regard to the course of a sailing vessel with which she may come into collision, not to proceed or to change her course while that uncertainty remains.

With regard to the damage, I do not think the amount

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claimed is excessive. The value of the vessel, including all her equipment for her business of oystering, is put at \$1,200: and I think the testimony shows it to be a fair valuation, and that, at that time of the year, when the oyster season had just begun, she could not be replaced for a less sum. The other amounts of loss seem to be reasonable, and I will sign a decree in favor of libellants for \$1,558 and costs.

District Court, District of Maryland, April 27, 1880.

WEIBYE v. DRESSEL, RAUSCHENBERGER & Co.

- It being proved that it is the etiquette among ship-brokers in Baltimore to allow the ship-broker who is consignee of a vessel to procure her the outward cargo when she is consigned to him free of commission; in a charter-party containing a provision that the ship should be consigned to a certain firm free of commission, the penalty for a breach of the charter-party, being forfeiture of freight, the consignee, in case of a failure of the ship to come to him, can recover only his actual damages; and the failure to have the privilege of getting for the ship an outward cargo is too remote to be the subject of damages. Nor can proof of the above custom alter or add to the contract contained in the written charter-party.

IN ADMIRALTY.

Marshall & Fisher, for libellant.

A. Stirling, Jr., for respondents.

MORRIS, D. J. This is a libel *in personam* by the libellant, who is the master of the Norwegian brig *Gazellen*, for the freight on a cargo of salt brought by the ship from Hamburg to Baltimore, and delivered to the respondents as indorsees of the bills of lading therefor. The ship received the cargo under a charter-party executed in Hamburg be-

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tween the libellant and a merchant of that place named Kleimbst, who shipped that salt.

The answer alleges that the freight had been forfeited, for the reason that, by a stipulation contained in the charter-party, the ship was to be consigned at Baltimore to the respondents, who are ship-brokers, and that the libellant did not consign the ship to the respondents, but consigned her to another firm of ship-brokers at Baltimore, in breach of the charter-party, and without cause, in consequence whereof the respondents lost the fees and commissions for clearing the vessel, and procuring her a new charter for her homeward voyage, which they would otherwise have earned and received.

The answer alleges that by a well-known usage and agreement among ship-brokers in Baltimore they will not accept employment in obtaining an outward charter for any vessel already consigned to another broker, so that if the ship had been consigned to the respondents, as stipulated, they would have earned the commission of $2\frac{1}{2}$ per cent. paid for obtaining such outward charter, together with fees for clearing her for her homeward voyage; that by reason of the breach of said charter-party the said commission and fees were earned and received by another firm of ship-brokers, and that the ship was consigned to them for the purpose of enabling said firm to earn and receive said fees and commission, and with intent to deprive respondents of them.

The charter is for a voyage from Hamburg to Baltimore, and the stipulation is: "The ship is to be consigned to *Dressel, Rauschenberger & Co.*, Baltimore, *free of commission*; * * penalty for non-performance of this charter-party, estimated amount of freight."

The libellant having safely transported and delivered the cargo there can be no forfeiture of the freight, and the extent to which recoupment on account of breach of the charter-party could in any event now be allowed would be actual damages.

The evidence offered by the libellants did not tend to prove any usage or custom by which a ship-broker, to whom

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a vessel was consigned, would have an absolute right to procure for her an outward freight. On the contrary, the evidence tended to show that when a vessel is consigned, as in this case, "free of commission," the ship-broker to whom she is consigned is not entitled to make any charge for attending to the business of the vessel while she is under that charter; and the only advantage to the ship-broker of having a vessel so consigned to him is that he has then the best chance of being employed by the master or owners to obtain for her an outward cargo, and that other ship-brokers would so far respect his position as consignee that, by common consent and usage, they would not interfere with him, and would refuse to take her out of his hands.

It was admitted that the master or owner might himself procure a homeward charter if he could, and would not then be bound to pay a commission to any one; or, if he pleased and could find another broker who would act for him, he might employ another broker without incurring any liability to the consignee.

It was, therefore, only a probability of employment and consequent compensation which the respondents would have acquired by having the vessel consigned to them, with the certainty that the business of entering her on her arrival and such other service as they might perform while she was under the existing charter they would have to perform gratuitously. In the case of *Phillips v. Briard*, 1 H. & N., 21, the stipulation in the outward charter-party was, "the ship to be consigned to charterer's agents in China free of commission on this charter;" language precisely similar in effect to the stipulation in the present case. The offer was to prove a usage by which consignees under such a stipulation were entitled to procure a homeward cargo for the ship and to charge the usual commission on the freight whether they procured it or not, provided they were prevented from procuring it by the owner or master procuring it himself or otherwise than through their agency.

But the court held that this usage was not admissible as against such a stipulation, as it would be adding to the plain

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language of the charter-party another and a different allegation, and would be in effect saying that because the vessel was consigned to the charterer's agents "free of commission" on the outward voyage, they were to be entitled to a commission on the homeward cargo, whether they were employed to procure it or not, which would be not explaining but adding to the written contract.

Now, if there could be no recovery under the present stipulation—supposing the owner to have actually consigned the ship to the ship-brokers, and then to have, immediately on her arrival, put her into the hands of another broker—it is difficult to see what positive and certain damage could arise from the breach of the stipulation to consign her to them.

The mere loss of an opportunity which might or might not have led to a profitable employment is too uncertain and speculative a damage on which to base a claim for breach of such a contract.

There was undeniably a breach of the charter-party. The ship was not consigned to *Dressel, Rauschenberger & Co.* as agreed. But if the ship had been consigned to them "free of commission," they would have acquired no legal right to perform any service or make any charge in respect to her, and the master could at any moment have declined to allow them to attend to the ship's business; and the fact that he then might have found it difficult to get another ship-broker in Baltimore to serve him does not, I think, alter the result.

I therefore pronounce in favor of the libellant for the amount of the freight, with interest; but as there was a breach of the charter-party, and the owner should not have allowed the stipulation to be put in the contract if he did not intend to observe it, I yield to the suggestion of respondents' proctor with regard to the costs, and shall give no costs.

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*United States District Court, for the District of Maryland,
May 26, 1880.*

**BRUDGE v. TWO HUNDRED AND TWENTY TONS OF FISH
SCRAP.**

*It is the duty of the master to determine what depth of water is necessary for loading, and under a charter-party guaranteeing a certain depth for loading, and binding the charterers to lighter the cargo to the vessel if there is not that depth at the place of loading, the master, if he allows his vessel to go to a wharf containing less water than the stipulated depth, cannot recover for damages and delay caused by the want of depth of water there. He should require the charterers to lighter the cargo to the vessel, and can recover demurrage for the delay caused by such a mode of loading.

IN ADMIRALTY.

Brown & Smith, for libellant.

Marshall & Fisher, for respondents.

MORRIS, D. J. The respondents in this case chartered the schooner *Martha Welsh* for a voyage from Stearn's Works, Guilford, Connecticut, to Baltimore, Maryland, and they engaged to provide and furnish to the vessel at Guilford 200 tons of dried fish scrap, in bulk—cargo to be put in vessel's hold by shippers, but trimmed, stowed and discharged by vessel's dispatch in loading and discharging. The charter-party contains this stipulation: "*Charterers guaranty ten feet of water at wharf, at Guilford, and agree to lighter balance of cargo at their expense.*" I am satisfied from the testimony that before the master of the vessel got to the wharf at Guilford he was warned that there was not ten feet of water there, and that shortly after getting to Stearns' wharf he well knew, both from information given him by others and from his own soundings, that hardly eight feet could be expected at high tide. Notwithstanding that knowledge, he allowed the parties at the wharf to con-

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tinue putting cargo on board until the vessel was hard aground, and could only be gotten off by unloading some portion of it. This unloading occasioned considerable delay, which is one of the items of damage claimed by the libellant.

The other items of damage are alleged injuries to the vessel from the grounding and delay during the time required for the consequent repairs. The charterers were not themselves putting the cargo on board, but the manufacturers, from whom the charterers had purchased it; and, notwithstanding the misstatement in the charter-party as to the depth of water, I think it was the duty of the master of the vessel to exercise ordinary skill and judgment for the protection of all concerned. Because he did not find at the wharf the 10 feet of water guarantied in the charter-party he was not justified in allowing his vessel to be loaded down to an extent which, in view of the certain knowledge he had acquired, if he had exercised ordinary judgment, he should have known would entail unnecessary delay and damage.

He was aboard all the time and cognizant of all that was being done. It was his business to know when his vessel was loaded to a prudent depth, and then it was his duty to go into deeper water and require the balance of the cargo to be lightered; and he had a right to be paid damages for the delay arising from the lightering rendered necessary by the want of 10 feet of water at the wharf. If the parties had refused to put the cargo aboard in lighters, he could have sailed without it and recovered full freight.

The master appears from his own testimony to have mistaken his duty, and to have supposed that he could put upon the persons engaged in putting the cargo on board the responsibility of determining when they had put in the vessel as much cargo as it was prudent to take on at the wharf. In this he was in error. At that time he had been several days at the wharf and knew quite as much about the depth of water as any one, his own soundings having shown him that there was only between six and seven feet

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at high tide; and as to the capacity and draft of his own vessel he should have known more than any one else, and it was for him to determine and decide when the loading at the wharf should stop.

It appears that 11 days elapsed from the time the vessel got hard aground at the wharf until she finally sailed for Baltimore. Six days of this time was consumed in unloading part of the cargo to lighten the vessel and get her out of the difficulty she should never have been gotten into, and the remaining five days were consumed in putting aboard the balance of the cargo from lighters after the vessel was anchored in deeper water. This last delay of five days would not have been necessary had there been 10 feet of water at the wharf, and demurrage at \$25 a day for these five days is to be paid by the respondents.

The libellant is entitled to a decree for the unpaid freight, and \$125 demurrage.

*United States District Court, District of Maryland,
June 1, 1880.*

MARSHALL v. TUG CONBOY AND BARGE "E."

- * It is the duty of a tug when towing with the tow lashed to her side not to permit her colored lights to be so obscured by the tow as to be invisible to a small schooner low down in the water; and the tug is responsible for a collision with such a schooner caused by the failure of the schooner to see her colored lights so obscured.

IN ADMIRALTY.

John H Thomas, for libellants.

John H B. Latrobe and *James A. Buchanan*, for respondents.

MORRIS, D. J. The excuse of the tug for not keeping

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out of the way of the schooner is that the schooner changed her course. The master of the tug states that when he had taken the barge in tow and got out from Henderson's wharf and headed down the stream, on his course for the Baltimore and Ohio Railroad elevators, he saw both of the schooner's lights coming towards him head on; that he ported his wheel a little to show the schooner his red light; that the result was that the schooner's red light opened more plainly to him. Finding that the schooner was getting close to him he put his helm hard a-port to avoid her, and just at that time she changed her course and showed her green lights and he then reversed at full speed but could not avoid the collision.

Assuming that the schooner did change her course, and assuming that the maneuvers of the tug were all of them proper, the tug has not exculpated herself, for the reason that the schooner could not see her lights, and having no warning of her approach, was not to blame for changing her course. It is to no purpose that the regulation lights are fixed and burning if they are so obstructed as not to be seen by approaching vessels. The tug was towing a barge 195 feet long, on which were double railroad tracks, and on these were eleven horse cars, such as are used for freight. The tug was made fast to the after end of the barge, and on the side furthest from that on which the schooner was approaching, so that there was not only the width of the barge and cars, but nearly the whole diagonal length of the mass of barge and cars, to obstruct the tug's lights. For the purpose of obviating the obstruction caused by the height of the cars on the barge, the tug's side lights had been fixed unusually high, and they were four feet higher than the tops of the cars, but by persons navigating a small vessel loaded down so deep in the water as was the schooner in this case, and approaching from the diagonally opposite end of the barge from the end to which the tug was made fast, they could not be seen.

The testimony of those on the schooner is that they were keeping along the southernmost side of the harbor, intend-

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ing to anchor just above Locust Point; that when they got around the Baltimore & Ohio Railroad's long pier near Fort McHenry, and almost a mile from Henderson's wharf, from which the tug started, they did change their course a little to the southward, conforming to the outline of the shore, and keeping near the docks; that they saw no lights whatever on the tug and barge until they were hailed from the barge at a distance of about 70 yards off on their starboard side; that they could then do nothing, as they had little more than steerage way, and the wharves were close on their port side; that they saw no light whatever, and were struck by the barge in less than two minutes after they heard the hail. The testimony of all on board the schooner is positive that they saw nothing but a dark mass moving down upon them. It is easy to believe that this was the fact. The only lights they could have seen were the two vertical mast head-lights of the tug, and the lantern which had been placed on the port side of the barge, on the platform beside the cars, midway of her length. It is quite possible, however, that to persons so near the surface of the water as those on the schooner these lights also were obstructed when close. But even if these lights could have been seen they would have afforded no sufficient indication of the direction in which the barge was moving, especially when surrounded by the numerous other lights of a crowded harbor.

It has been urged that the tug and tow were in fault in not observing the ninth rule prescribed by the board of supervising inspectors of steam-vessels, which, in addition to the other regulation lights, requires that on tows of canal boats and barges a white light shall be carried on the extreme outside of the tow, and also on the extreme after part; but it appears to me that the fault which led to this collision was permitting the colored side lights of the tug to be so obstructed by the cars as not to be visible to any one low down on the water on her port side.

From these considerations, in my judgment, it results that the tug is to be held liable for the collision, and it becomes

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unnecessary to discuss the testimony tending to show that, even after the schooner is said to have changed her course, the tug might have avoided her by reversing at once, or going to port instead of continuing to go to starboard under a hard a-port wheel.

Proof has been offered showing the total damages to have been \$4,501.28, itemized in a statement filed by libellant's proctor. The items of this statement are satisfactorily proved, with the exception of the propriety of the four and a-half months' demurrage. From the ship-carpenter's own testimony it appears, I think, that three months should have been a reasonably sufficient time in which to have completed the repairs made necessary by the collision. I therefore deduct one month and a-half, which would reduce the demurrage from \$553 to 368.67.

*United States District Court, for the District of Maryland,
June 1, 1880.*

APPLEBY AND OTHERS *v.* THE BARK KATE IRVING AND
THE STEAM-TUG ALICE M. EHRLMAN.

BROWN AND OTHERS *v.* THE STEAMSHIP WINTHROP
AND THE STEAM-TUG ALICE M. EHRLMAN.

Held to be a fault for a large steamship in the Brewerton channel of the Patapsco River to keep up her speed of eight miles an hour when the channel was obstructed by a tug and tow ahead which it was apparent must get out of the way to enable the steamer to pass. In navigating such a channel allowance must be made for unusual emergencies, and precaution and care must be increased in proportion to the increased risk and difficulties.

IN ADMIRALTY.

John H. Thomas, for libellants.

Sebastian Brown, and *I. Nevett Steele*, for respondents.

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MORRIS, D. J. This collision occurred off North Point Light, in the Brewerton channel of the Patapsco river, about 5 o'clock in the afternoon of January 13, 1880. The British steamship Winthrope, 1,500 tons, with a cargo of iron ore, had entered the river and was proceeding up the channel for Baltimore at eight miles an hour. The steam-tug Alice M. Ehrman, towing the bark Kate Irving, 710 tons, laden with grain, had just left the port of Baltimore, and was proceeding down the channel at about four miles an hour. The channel is about 350 feet wide.

The case on behalf of the steamer Winthrope is that the tug, when about a mile and a-half off, blew one blast of her whistle, indicating that she intended to pass the steamer port to port; that the steamer responded with one whistle, ported her helm, and kept near the northerly bank of the channel; that when some 300 or 400 yards off the tug again blew one whistle, to which the steamer responded, and putting her helm hard a port ran so far to starboard that she ran upon a buoy on the northernmost edge of the channel; that the tug had also ported her helm, but had so little power, and the bark was so badly managed, that although the steamer passed the tug without accident, and although the bow of the bark was drawn out of the way, the stern of the bark swung around, and her port quarter came into contact with the port side of the steamer, about eight feet from her stern and seriously damaged her.

The case on behalf of the tug is that she saw the steamer coming up the middle of the channel, about three or four miles off, and having a heavy, deeply-laden ship in tow, she desired, in passing the steamer, to go to the windward, or northerly side of the channel, and accordingly, when the steamship was a little over a mile off, she gave not *one* but *two* blasts of her whistle; that to this she received no reply, and being herself in the middle of the channel, she continued some minutes without changing her course, in expectation of a reply, when, perceiving that the steamer had already got somewhat to the north of the middle of the channel, she gave *one* blast of her whistle, at the distance of half a mile

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apart, to which the steamer at once responded; that the helm of the tug and that of the bark were immediately ported, and both tug and tow went gradually to southward, and the helm of the steamer being apparently at the same time ported, she went off to northward, but was so badly steered that she ran upon one of the buoys marking the northernmost edge of the channel, and immediately thereafter took a strong sheer to port, so that as she passed the tug, her direction was at a considerable angle with the line of the channel, and four men were seen at her wheel putting it over hard a-port; that the steamer began to yield to the port helm, and by the time she got to the bark, which was being towed 300 feet behind the tug she had rounded somewhat to starboard, but nevertheless she struck the bark on her port quarter, about 30 feet from her stern, with the anchor of the steamer, which was improperly hanging over the port bow, and considerably damaged the bark; that the steamship was moving at the rate of eight or nine miles an hour, and, in approaching the tug and tow, did not lessen her speed.

The libel on behalf of the bark charges the blame of the collision upon both the steamer and the tug; upon the tug for giving conflicting signals, and upon the steamer for not slowing or stopping, and for improper steering. It is obvious that the care and skill required to enable a large steamship and a tug, encumbered with a heavy tow, to pass each other in the Brewerton channel, without risk of collision, have not been exercised in this case. The wind was light, the water smooth, and the day clear, so that there was nothing but want of seamanship to account for the collision. That the tug did not do all that, in the exercise of proper skill and diligence, she should have done, appears, I think, from the testimony of her own officers and from the admitted facts. Her master states that he did at first propose to take the northerly side of the channel, and gave notice to the steamer of his intention by two blasts of his whistle when a mile and a-half off. He states that he got no reply, but kept on down the middle of the channel, until within half a

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mile of the steamer, without giving any other signal, or at all changing his course. Notwithstanding he received no answer to his signals, from which the inference was that they were not heard, it appears that he must have continued his course as if he were going to the northernmost side of the channel for some five minutes without repeating them. Then, seeing that the steamer had gone to the northernmost side, he gave one blast to signify that he was going to the southernmost side, which was responded to by the steamer, and then, he says, "we changed our wheel *a little to port*."

The engineer of the tug who executed the master's orders shows how little this porting was. He says: "When half a mile off the captain ordered me to blow one whistle. The steamer was then tending a little to the north side of the channel. I blew one whistle *and had ported my wheel about a minute or two when the captain told me to steady her*." It is not surprising that, being encumbered by a tow quite sufficiently heavy to tax her capacity, this brief porting of the tug's wheel had but little effect upon the position of the bark. It is evident that the tug wished to keep as near as she could to the northern bank of the channel, because there was the deepest water and the least risk of her tow grounding, and with this fact before me, and the testimony of her own officers as to how little and how late she ported her wheel, and with the testimony of those on the steamer as to how near to the north bank the bark was at the moment of collision, I have no difficulty in believing that the bark was well north of the centre of the channel, and that the tug was in fault in taking the bark dangerously and unnecessarily near to the course of the steamer.

The other question presented is, was the steamer also to blame? The testimony shows that the steamer was proceeding at nearly if not quite full speed. She was in command of one of the regular Chesapeake bay pilots, and he has testified that in his judgment it was safe and prudent for him to bring the steamer up the channel at that speed, notwithstanding there was in sight ahead of him, a tug encumbered with a tow.

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But several others of the Chesapeake pilots, of equal skill and experience, have unqualifiedly expressed the contrary opinion. They say that in the Brewerton channel, if there is no obstruction of any kind ahead, and every vessel within reasonable distance is well out of the way, so that the channel appears free, they deem it safe to proceed at eight or even ten miles an hour; but they all agree that it is not prudent, and it is never their practice, to run a steam-ship eight miles an hour (if she is of such draft that she must keep to the channel) when approaching a tug and tow. Their testimony is that in such cases they invariably slow the steamer down to half speed, so as to have her perfectly in hand.

If we take the statements of the witnesses on board of the steamer to be literally true, it is evident that to them the channel must have appeared very much obstructed. They testified that although at the moment of passing the tug the steamer was so near the northernmost bank of the channel that she struck one of the buoys, yet the tug passed so near them that, as the captain of the steamer says, he "could have nearly jumped on to the tug from the steamer's bridge." The pilot himself testifies that when they collided with the bark the steamer's bow was only about 30 feet from the line of the buoys on the northernmost side of the channel.

These statements show conclusively that the pilot and captain of the steamer could not have regarded the channel as clear, and as, according to their own testimony, they saw that the tug and tow were on the extreme northern edge of the channel, they knew that there was no possibility of their passing in safety unless the tug and tow succeeded in getting out of the way. The pilot gives the situation, as it appeared to him, when he says "that he had no apprehension of danger until he found that the bark *was not getting out of the way sufficiently to give him room to pass.*" It is true that vessels meeting each other end on, at a considerable distance from each other and with plenty of sea-room, have a right to proceed at full speed, each having a right to

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act upon the assumption that the other will perform its duty. But this rule is not applicable to the navigation of the Brewerton channel by large vessels, of heavy draft, and I think it plainly appears that the rule with regard to speed, which the testimony of the pilots, who were examined as experts, shows has been generally adopted by them, is, in so narrow a water, only a reasonable and necessary precaution against danger.

It appears to me, however, from the testimony, that the captain and pilot of the steamer are somewhat mistaken in supposing that the tug and bark had not succeeded in getting further from the north edge of the channel than they represent in their evidence. It would seem that there was another cause which contributed to bring the vessels into collision, and which they under-estimate. This cause was the fact that about the time the tug passed the steamer, which was also nearly about the same time that the steamer ran on to the buoy, the steamer took a decided sheer to port away from the north side of the channel and headed for the bow of the bark, and at quite an angle with the direction of the buoys. What it was that caused this sheer the testimony does not satisfactorily establish. It may have been bad steering in the attempt to steady the ship on her course after she ran on to the buoy, under the excitement of apprehension that she was in danger of grounding, or it may have resulted from a tendency which some of the witnesses say vessels have to sheer off when approaching shallow water.

That the steamer did make such a sheer is satisfactorily established, not only by the direct testimony of those on board of the tug and bark, but also by the facts and admissions contained in the testimony of those on the steamer. These latter testify that they had the helm hard a-port when the steamer was 300 or 400 yards from the tug; that even after she ran on to the buoy her helm was never put to starboard, and it also appears that when the steamer was abreast of the tug the captain and pilot were assisting the two wheelmen in the attempt to get the wheel still more

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to port. So that it seems evident that if the steamer had not taken a sheer she must certainly, under a hard a-port helm, have run outside of the buoys. One great danger of a high rate of speed is the short time allowed in which to rectify any error of judgment or counteract any unexpected occurrence; and, whatever may have been the cause of the sheer, no collision would probably have occurred if a less rate of speed had allowed more time to overcome it or more time for the bark to escape from it. In navigating such a channel allowance must be made for unusual emergencies, and precaution and care must be increased in proportion to the increased risk and difficulties; and in this case I have been unable to bring my mind to any other conclusion than that the tug was in fault in delaying until so late in getting herself and her tow out of the way of the steamer, and that the steamer was also in fault in maintaining her full speed up the channel in the face of such obvious obstructions. The bark appears to have governed her movements in strict conformity to those of the tug, and not to have been in fault.

It therefore results that the whole damage is to be equally borne by the tug and the steamer.

United States Circuit Court, District of Maryland, June 10, 1880.

KENNEDY AND OTHERS *v.* STEAMER SARMATIAN.

- *1. Estimates by witnesses in collision cases of time and distance are rarely reliable; the attending facts and circumstances being a safer guide.
2. The lighted torch which section 4234 U. S. Rev. Stats. requires a sail vessel to show on the approach of a steam vessel must be exhibited in time to give the steamer ample notice of the proximity of the sail vessel and enable her to keep out of the way; and it is negligence to postpone its exhibition till a collision is imminent.

Facts found by the Court.

3. It must be shown as well when a steamer is coming up astern of the sail vessel, as when approaching from any other direction.
4. The office of a look-out being to watch for and report danger from every quarter, he must be in a position to see and give timely notice of danger from astern as well as in front, and if one look-out cannot do this, more must be provided.
5. The fact that the approaching steamer was not an American vessel and that by the law of her nationality torch-lights on sailing vessels are not required, is no excuse for the failure of an American sail vessel in American waters on pilot ground to exhibit them; and the failure to exhibit them in time and to give any other timely notice of her presence was negligence.
6. It is not negligence for a steamer with proper look-outs, on a night when lights could easily be seen and in a broad expanse like Chesapeake Bay, to proceed at her usual speed in the absence of any apparent danger; for she has the right to assume that other vessels will give the notice of their presence required by the law or usages of the place.

FACTS FOUND BY THE COURT.

1. A collision occurred between the American schooner *Newell B. Hawes*, owned by the libellants, and the British steamer *Sarmatian*, at about 5:45 in the morning of November 29, 1878, in the waters of Chesapeake Bay, five miles or thereabouts north by west from Cape Henry. The night was clear, but a slight haze rested on the water.

2. The schooner was a small craft, chiefly employed in the oyster trade. She was on a voyage, in ballast, from Boston, Massachusetts, to Tangier Sound, Maryland, for a load of oysters. Her course was about north, up the bay, with the wind W. N. W. She was on her port tack, with her sails hauled as flat aft as possible, and making not more than two or three miles an hour. The collision occurred during the mate's watch, which came on at 3 o'clock, and consisted of the mate and one seaman. The seaman took the wheel at 4 o'clock, and from that time the mate was the only look-out. There were six other vessels in sight, all of which had come in from sea in company with the schooner.

3. The *Sarmatian* had all her regulation lights set and brightly burning, and was seen by the mate of the schooner a considerable time before the collision, and when she was some miles away. She was on a voyage from Liverpool to

Facts found by the Court.

Baltimore, having touched at Halifax. When first seen by the mate she showed her green and white lights off the starboard quarter of the schooner. The mate watched her until she appeared to be passing as if to cross his stern and go into Norfolk. He then went forward and kept a look-out ahead. While he was forward the man at the wheel saw the red light of the steamer and her white light. He also saw the lights in her cabin, and came to the conclusion in his own mind that she would pass up the bay to the leeward of the schooner. He gave her, however, but little thought, and did not tell the mate what he saw. Afterwards the mate started aft to look again for the steamer. Not seeing any light to the starboard, as he expected, he stooped down and looked under the yawl, which hung from the davits at the stern. He then saw the red light and at once ran to the cabin for a torch. As he went he told the man at the wheel that a steamer was coming up behind, and he was going to show her the torch-light. The captain, who was in the cabin smoking, hearing this remark, reached for the torch, but before he could get it out of the can the mate seized it, and, when the captain had removed the chimney from the lamp, lighted it and ran at once on deck, where he held it out over the taffrail. The captain followed the mate to the deck immediately.

4. The Sarmatian took a licensed Baltimore pilot on board just outside the capes, and from that time until after the collision the captain, pilot and second mate were on the bridge attending to their respective duties, and two able seamen were at the bow, one on the starboard and the other on the port side, as look-outs. From the time the pilot came on board the steamer proceeded on her course at the rate of 12½ or 13 miles an hour, and did not slacken her speed until just at the moment of the collision. Her deck, on which the look-outs stood, was 20 or 25 feet above the water, and the bridge still higher. As the night then was, a small vessel like the schooner, with her sails hauled down close, and without any lights except her regulation side lights, could not be seen for any considerable distance

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from the steamer, and the schooner was not actually discovered by any one until the torch-light was displayed. Then she was seen by all five of the persons on watch almost simultaneously. At first the reflection of a light on the masts, sails and rigging was seen by all, and then for a very short time only the torch itself was seen by the pilot, who stood at the starboard end of the bridge, and by the look-outs. The vessels were so close together that the hull of the steamer intercepted the view of the torch from where the captain and second mate stood on the bridge, and very soon shut it out from the others. As soon as the light was discovered the wheel of the steamer was put to starboard, and her engine backed at full speed, but before the course of the steamer could be materially changed, or her speed slackened, she passed along-side the schooner so close as to carry away some of the schooner's rigging, but did not injure the hull. No hail was given the steamer from the schooner until after the damage was done.

5. Had the torch-light been exhibited sooner from the schooner, it is not probable the collision would have occurred.

CONCLUSIONS OF LAW.

1. The schooner was in fault for not showing her torch-light in time, or giving some equally good notice of her presence and position.

2. As this was the sole cause of the collision the libel should be dismissed.

Brown & Smith, for appellants.

John H. Thomas & Son, for appellees.

WAITE, C. J. I have had no difficulty in reaching the conclusion that the torch-light was not shown from the schooner until it was too late for the steamer to avoid the collision, and that if it had been shown at a proper time no damage would have been done. Although all the witnesses

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from the schooner concur in saying that some minutes elapsed after the light was displayed before the vessels came together, it is clear to my mind that they were mistaken. Mere estimates, by witnesses in collision cases, as to time and distance can rarely be relied on with confidence. It is always safer in determining such questions to be governed by the attending facts and circumstances.

The lights were first brought to the attention of the five persons looking out from the steamer at the time by its reflection on the sails and rigging of the schooner, and they all saw it simultaneously. This, I think, must have been when the mate was coming out from the cabin with the torch lighted, and before he got on deck. Under such circumstances the reflection would almost necessarily be seen before the light itself. Immediately afterwards the torch was seen for a moment only by the two look-outs on the bow, and the pilot at the starboard end of the bridge. The captain, at his place near the middle of the bridge, and the second officer at the port end, did not see it at all, as the hull of the steamer intercepted their view, and it was soon shut out from the others in the same way. These facts are fully established, and satisfy me that the reflection was seen as soon as the mate came out from the cabin, and that the vessels must have been very close together.

The testimony from the schooner is to the same effect, and equally conclusive. The mate saw the green and white lights of the steamer when he thought she was a good distance away, and not anticipating any danger went forward to look for vessels ahead. While he was there the steamer changed her course so as to expose her red and white lights, and yet near enough to render her cabin lights visible. This was noticed by the man at the wheel, but, as he thought she would pass to the leeward, he did nothing, and gave the mate no warning. A while afterwards the mate turned aft to see where the steamer was, and not finding her lights off to the starboard stooped down, and, looking under the yawl, discovered her red light. He started immediately for the torch in the cabin, and ran as fast as he

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could, telling the man at the wheel there was a steamer behind, and that he was going to show her a light. The captain in the cabin hearing what the mate said, reached for the torch, but before he could get it out of the case the mate snatched it from him. The captain then removed the chimney from the lamp, and the mate, after lighting the torch, ran back on the deck as fast as he could, the captain following him. As soon as the mate got on deck he swung the light over the taffrail. All this indicates haste and excitement, and is entirely inconsistent with any idea that the steamer was five or six minutes away when the light was exposed. Unless I disregard entirely the testimony of all the witnesses from the steamer, and pay no attention to what happened on the schooner, I must find, as I do, that when the torch was first brought out from the cabin the collision was imminent, and could not have been avoided.

The rule is imperative which requires a steamer to keep out of the way of a sailing vessel, and this whether the steamer is overtaking a sailing vessel or passing her from the other way. But it is equally imperative on the sailing vessel in the night-time to notify the steamer of her presence and position by the display of such lights and signals as the law or the usages of navigation prescribe. If she fails in this, and a collision occurs on that account, she must bear the loss. Section 4234 of the Revised Statutes requires that every sailing vessel "shall, on the approach of any steam-vessel during the night-time, show a lighted torch upon the point or quarter to which the steam-vessel shall be approaching." This seems sufficiently broad to cover all cases, but the libellants contend it does not require the light to be exhibited to a steamer coming up astern. Certainly, there is nothing in the language to indicate any such exception. The light is to be exhibited on the approach of any steam-vessel in the night. Nothing is said about the direction, thus implying that the signal must be given if the approach is from any quarter.

The rule is of comparatively recent origin, having been adopted by congress for the first time in 1871, (16 St., 459,

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§ 70,) and was undoubtedly intended to supply a defect in the regulations of 1864, (13 St., 58,) which only required a sailing vessel, when under way, to carry her colored side lights, and they could not be seen astern. Under such circumstances a vessel coming up from behind had nothing to guide her except the hull or sails of the one ahead, when they can be seen. When both were sailing vessels this was comparatively unimportant, because it is rare that the speed of the following vessel is such as to prevent her from getting out of the way after she is near enough to see what is ahead. With steamers, however, it is different. For this reason, when such a vessel was approaching, another light seemed sometimes to be necessary, and the torch was provided. As the side lights were visible ahead, it is clear that the primary object of the additional rule must have been to show a light behind where there was none before.

It is objected, however, that this would require a look-out at the stern as well as the bow, and, therefore, such could not have been the intention of the rule. The office of a look-out is to watch for and report danger from whatever quarter it may be expected. If it can come from behind, he must look there enough to see when it is approaching and give the necessary warning. He must be stationed where, under the circumstances of the situation, he can best perform all his duties, and if one cannot do all that is required, another must be added. Ordinarily, on a sailing vessel in open waters, one is enough for all purposes, and his station will be at or near the bow. From there he can usually see a steamer coming up behind in time to give the necessary warning without interfering with his duties ahead. But, whether that be so or not, it is clear that the rule contemplates the keeping of a sufficient watch over the stern to enable the vessel to perform her duty as to the lights, and if the situation is such that one look-out is not enough there must be more.

It is next insisted that as the Sarmatian was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover

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notwithstanding she exhibited hers so late. The two vessels were at the time on American waters, and not on the high seas; they were in the Chesapeake bay, and *infra fauces terrae*. A vast majority of the commerce carried on there was coastwise and local. The Sarmatian was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty, and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground, simply because the vessel it meets is sailing under a foreign flag. Pilots are employed not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly.

While the acts of congress may not be binding on foreign vessels, the local usages growing out of these observances are. *The Fynewood*, Swabey, 374. I see nothing in the cases of *The Zollverein*, Swabey, 96; *The Saxonia*, 1 Lushington, 410; *The Dumfries*, Swabey, 68; or *The Chancellor*, 4 Law Times Rep., 627, to the contrary of this. The acts complained of in *The Zollverein*, *The Dumfries* and *The Chancellor* were all on the high seas, off from pilot ground, and the authority of *The Fynewood*, subjecting a foreign vessel to liability for the non-observance of local usages in territorial waters, is clearly recognized in *The Saxonia*, (p. 421,) where the Eclipse was condemned, not because she

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did not carry the regulation lights, but because she showed no light at all until it was too late to prevent the collision. As was said by the master of the rolls in the case of *The Saxonia*, (p. 422,) "no blame can attach to a vessel for running foul of another vessel if it has been impossible to distinguish it until the collision was inevitable." In the condition the schooner in this case was, with the edge of her sails towards the steamer and her small hull low in the water, at the darkest hour in the night, it is clear beyond question that she could not be seen from the steamer unless something was done to make her presence known. If as against a foreign vessel she was not bound to show a torch-light, she certainly was not at liberty to abstain from doing anything calculated to give notice of her position, and of the danger the steamer was approaching. Had she shown her torch-light in time it would have been enough, but as she neglected that, and did nothing else calculated to effect the same object, she was clearly at fault under the general rules of the sea, as well as the statutory rules. This brings her within the rule under which the *Eclipse* was condemned as against the *Saxonia*, and is enough for the purpose of this case.

It is next contended that the *Sarmatian* was at fault for going too fast. She was proceeding at her usual speed in an open sea. While the night was dark, it was clear, and lights, when displayed, could easily be seen. She had a full watch on deck, attending to all their duties. She was not bound to slacken her speed until there was apparent danger, *The Scotia*, 14 Wall., 181, and she had the right to act on the belief that every vessel she approached would give such notice as the local usages of the place, or the general rules of the sea required. In order to know what the local usages were she took a licensed pilot on board. Under these circumstances she might keep up her usual speed until something appeared to make it improper. Had the schooner performed her duty this speed would not have involved any loss to her.

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On the whole, I am satisfied that the decree below was right, and a decree may be entered here dismissing the libel, with costs in both courts.

United States District Court, District of Maryland, June 28, 1880.

MERCHANTS' STEAM-SHIP CO. OF CHARLESTON, SOUTH
CAROLINA *v.* THE SCHOONER S. C. TRYON.

* In a collision case between a steamer and a schooner, in which the testimony of the crews of the two vessels was irreconcilably in conflict, the court, basing its opinion upon the testimony of the crew of a third vessel in close proximity at the time of the collision, and which was confirmatory of the testimony of the steamer's crew, pronounced the schooner in fault.

IN ADMIRALTY.

John H. Thomas, for libellants.

Brown & Smith, for respondents.

MORRIS, D. J. The case for the steamer, as stated in the libel, is that she left the port of Baltimore on the afternoon of the eighth November, 1879, with eight passengers and a full cargo of merchandise, on one of her regular voyages from Baltimore to Charleston, South Carolina; that about 9:45 P. M., the night being starlight, with a slight haze on the water, the wind a seven-knot breeze from the southward, the steamer going on her course S. by E. one-half E. down the Chesapeake Bay, at nine miles an hour, having all her regulation lights burning, and her second mate, with an experienced seaman, in the pilot-house, and two look-outs in the bow, when, about eight miles above Cove Point, one of the look-outs reported a red light one

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and one-half points over the steamer's *port* bow; that the second mate and the man at the wheel satisfied themselves that the light was on a sail vessel about one and one-half miles off, coming up the bay with a fair wind, and *ported* the helm of the steamer so that she fell off about one point and a half; that when the said vessels were within 300 or 400 yards from each other, and were sufficiently apart not to justify any apprehension of danger, the schooner being still on the steamer's port bow, and showing only her *red* light, the schooner suddenly, and without cause, starboarded her helm and showed both her lights; that the steamer's helm was then put *hard* a-port, and her engines stopped, but said vessels were so near together that the schooner struck the steamer amidship on her port side, cutting her to the water's edge, and doing her such damage that she sank in about 10 minutes in water some six fathoms deep; that the passengers, officers, and crew of the steamer escaped in the small boats, and got aboard of the schooner, and were brought to Baltimore.

The answer of the claimants of the schooner S. C. Tryon alleges that the schooner was coming up the bay on the starboard tack, making six knots an hour, with the wind from southward and eastward, her course being N. by W. one-half W., her master in charge of the deck, a look-out in the bow, and a man at the wheel; that the look-out reported the steamer's mast head light about five miles off, and from half a point to a point on the schooner's *starboard* bow; that a few minutes after this light was reported the *red* light of a sailing vessel was discovered directly *astern* of the schooner, and 150 yards distant, gaining rapidly on the schooner, so that a collision seemed imminent, unless the schooner fell off and gave the sailing vessel room to pass; that the schooner did fall off for a few seconds, going about 40 feet from the line of her original course, and then resumed her course of N. by W. one-half W.; that the steamer, which afterwards turned out to be the Falcon, continued to bear *one* point on the schooner's *starboard* bow, and was about three miles distant when the schooner re-

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sumed her course; that about five minutes later, the steamer's *red and green* lights being then visible, the master of the schooner exhibited to the steamer a *lighted torch*; that the steamer kept her course, continuing to bear one point on the schooner's starboard bow, until she got very near to the schooner, when all at once the steamer ported her helm and started across the course of the schooner; that as soon as the steamer made this attempt a collision became inevitable, and for the purpose of easing the blow, and preventing the steamer from running over the schooner, the helm of the schooner was put "hard down," causing the schooner to go to starboard, and the order had hardly been executed when the vessels came together, the port bow of the schooner striking the steamer's *port* side, at an angle of about 50 degrees, between the stern of the steamer and the stern of the schooner.

It is obvious that the statements contained in the libel and in the answer are in direct conflict and are utterly irreconcilable. The steamer's case is that the schooner was approaching her on the *port* bow, exhibiting her *red* light. The schooner alleges that she was approaching the steamer on the *starboard* bow, exhibiting her *green* light. The steamer claims to have been going to *starboard* to get further away from the schooner's *red* light. The schooner claims that she was already on the *starboard* side of the steamer, and that the steamer, by going to *starboard*, went across her bows and brought about the collision. There was no excuse for any mistake, as the night was starlight, and clear enough to see lights at the distance of five miles, and these two vessels had been approaching nearly head on, and profess to have been observing each other's lights for at least a quarter of an hour.

After examining most patiently the testimony of all the witnesses on board the colliding vessels, I have not found in the statements of those who testify for either side anything *in itself* indicative of an intention not to tell the truth. The navigation of both vessels would seem to have been in the hands of experienced and faithful men, and it

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has been with great reluctance that I have found that a decision of this controversy must discredit witnesses on one side or the other.

There were on the steamer, during the whole time the vessels were approaching each other, at least one look-out on duty in the bow, and part of the time two. In the pilot-house there was the second mate, who had nothing to do but to watch the navigation of the ship, and a wheelsman, whose sole duty it was to attend to the steering. So that there were at least three men on the steamer attending to duties not at all difficult for men of their experience to perform, and who could hardly, without the grossest obtuseness, have all escaped seeing the lights of the schooner. That the red light of some vessel on the steamer's port bow was reported several minutes before the collision is confirmed, if Captain Kirby's testimony is to be believed. He was sitting in his room adjoining the pilot-house, smoking. He heard the mate answer "Aye, aye, I see it;" heard him give the order "Port a little." He heard the wheel move, and then the order "Steady;" and some minutes later he heard the mate say, "Confound that fellow, he has altered his course," and give the order "Hard a-port." Hearing that, he says he jumped up and went into the pilot-house, and saw the schooner very near and heading for the steamer at an angle of about 45 degrees on her port bow.

Then, if we look at the schooner, we find that there were on the deck of the *schooner* the *master*, the *look-out*, and the *wheelsman*, all of them (judging from the testimony) experienced mariners, and all of them attending to their respective duties. Their testimony supports, in every particular, the allegations of the answer, and is, so far as I can see, consistent with itself and to all appearance worthy of credit. They asseverate that the steamer was never on their port side, but, from the time she was first seen by them until just prior to the collision, continued steadily about a point on the schooner's starboard bow, showing all the time both her lights. It did, upon first impression, seem to me im-

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possible that to the schooner, which was moving *six* miles an hour, a *steamer*, which was moving *nine* miles an hour, could continue for 15 or 20 minutes to show *both* her lights a point over the schooner's port bow; but, without better information, however, than I now have of such matters, I am not prepared to find that the fact that the steamer was porting her helm and all the time altering her course more or less to starboard, might not have produced that result.

There are, however, some few facts developed by the testimony of persons not on either of the colliding vessels, which, after careful consideration, have brought me to a decision of the questions I am required to pass upon.

The answer alleged, and the master of the schooner and her crew more circumstantially stated, that there was from the first sighting of the steamer another sailing vessel about 150 yards astern, off the schooner's starboard quarter; and one theory of the claimants is that it was the light of this vessel that those on the steamer were observing; that, by reason of their negligent look-out, those on the steamer never saw either of the lights of the schooner, nor the torch which she exhibited, and that it was not until in the effort to avoid this other sailing vessel, which was to the eastward of the schooner Tryon, and whose *red* light the steamer *did* see, that the steamer brought her head so much over to the westward that she crossed the schooner's bow and then for the first time saw her lights, and supposed that the other vessel had changed her course and that the lights were on her. This theory was not without some support from the facts and probabilities of the case, and tended to reconcile many of the conflicts in the testimony of the opposing witnesses.

After, however, much of the testimony on both sides had been taken, that other sailing vessel was discovered, and she turned out to be an oyster puny, called the Patterson & Bash. And the testimony of her master and mate was then offered by the libellants. Their testimony is that of persons who actually saw the collision, and who had a fair opportunity of observing much that led to it; persons, too,

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who have no interest in this controversy, and who are strangers to the parties interested in it. It is testimony, therefore, I think, which in a case of such conflict is entitled to weight, so far as it is intelligently given, and so far tends to prove facts which may have been within the knowledge of the witnesses.

The master of the Patterson & Bash states that he was coming up the bay to Baltimore with a load of oysters, and that, as his was a small boat, he got nearly astern of the schooner Tryon, and kept her all the time about a half a point to the westward on his port bow, as a guide to steer his boat by, and as a protection to him from approaching steamers; that he saw the steamer's lights—*first*, her mast-head light, and afterwards her side lights also, and that the steamer bore as did the schooner, about half a point on his port bow; that at the distance of about a mile the steamer shut in her *green* light and showed only her *red* light, indicating that she had gone to westward; that he maintained his position with regard to the schooner, keeping her about 200 yards distant and about half a point over his port bow, until the schooner got to be some 200 or 300 yards from the steamer, when both he and the mate testify that they observed the schooner go off to the westward, and he then said to the mate there would be a collision. He says he was near enough to hear the order given on the schooner, "Hard down! Hard down!" repeated twice, and immediately afterwards he heard the crash of the collision.

Both master and mate testify that for some time prior to the collision they had seen only the *red* light of the steamer, and such was their nearness to the schooner that they undertake to say that the *schooner could not possibly have seen the steamer's green light*. They testify that for a little while before the collision the schooner bore off to the westward, and that without that change in her course she would have gone two or three hundred yards clear to the eastward of the steamer. Some of this testimony consists of mere deductions and inferences of the witnesses, and is to be received with great caution; but in part it is a statement of

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facts which must be accepted as true, and the inferences are mostly such as, I think, necessarily result from the facts.

It must be accepted as a fact that the master and mate of the Patterson & Bash first saw both of the lights of the steamer, and then to them her green light disappeared and they saw only her *red* light, and continued to see only the *red* light up to the time of the collision. This agrees exactly with the changes in the steamer's course testified to by those on board of her.

Next, it must be admitted that the Patterson & Bash was close to the schooner; the master of the schooner says about 150 yards off, and the master and mate of the Patterson & Bash say never over a quarter of a mile off. From the testimony of the master and mate of the Patterson & Bash it appears that they kept the schooner nearly in a line between their boat and the steamer, so that I am brought to the conclusion that the lights of the steamer must have appeared to those on the schooner almost identically as they did to those on the Patterson & Bash. The proximity of the Patterson & Bash to the schooner at the time of the collision is confirmed by the fact that the wind blowing strongly and directly away from them, those on the Patterson & Bash heard the order given by the master on the schooner.

It is to be noticed, too, that the judgment of the master of the Patterson & Bash, as to the effect of the alleged change of course of the schooner in causing the collision, is not a judgment made up after the event, but, unless he swears falsely, was what he at the moment expressed to the mate as soon as he observed the change of course, and before he heard the crash of the collision, and when he could hardly have been mistaken as to the relative positions of the vessels.

The production of the testimony from on board the Patterson & Bash gives rise to another significant consideration. Those on board of her had been sailing near to the schooner for an hour or more, keeping nearly under her stern and using her as a guide to steady their course by,

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yet they say nothing of the torch-light, which, it is said, was exhibited on the schooner. It is hardly possible that if it was exhibited they should not have seen it. A torch is not like a fixed light, which must be looked for to be discovered, but it is a blaze which illumines the deck and sails of the vessel exhibiting it, and makes a glare that it hardly seems possible that any one within a mile or two could fail to take notice of, and which certainly would have been seen by persons on a vessel a little astern and not over a quarter of a mile distant. Evidence was introduced by the claimants for the purpose of showing that the wheelsman of the steamer was not a temperate man, and that he had been drinking when he went on duty at 8 o'clock.

This testimony was not very convincing, and the fact has been strenuously denied, and the charge receives no corroboration from the actions of the wheelsman, as the other testimony discloses them. He had been an hour and three quarters on duty at the time of the collision, under the immediate supervision of the captain and second mate, (the captain having been in the pilot house until some ten minutes before the collision,) and, if the wheelsman had failed to understand and execute the orders given him, or to have kept the steamer steady on her course, it would have been quickly detected, and it is not to be believed that they would have permitted him to remain on duty if such had been his condition.

The whole theory of the respondents' case is, not that the steamer failed to execute through bad steering some manœuvre which her officers attempted to make, but that she failed to see the lights of the schooner at all until in the act of crossing her bows. This would have been a fault with which the *wheelsman* would have had nothing to do.

Evidence was also introduced for the purpose of discrediting one of the steamer's look-outs by showing that he was in the forecastle at the time he stated he was on duty and observed the change in the schooner's course; but this is the one of the look-outs who, it was admitted, was liable to be called off for other duties, and was not the one on whom

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rested the responsibility of uninterrupted attention, and, in the consideration of the case, I have excluded his evidence. Even if it be true that he attempted to swear to facts which he did not observe, I do not think it has been shown that the other witnesses for the steamer were aware of it. It was argued that the steamer's look-out was insufficient because they never saw or reported the lights of the Patterson & Bash. This, I think, is fully accounted for by the fact that the Patterson & Bash being in a line with the schooner and astern of her, her lights would have been hid by the schooner's sails which were all boomed out. All the steamer's witnesses speak of a vessel which passed to the eastward just after the collision, when they were in the small boats, and which they tried to hail, and it seems probable that this was the Patterson & Bash.

Although this case is one of great conflict of testimony, and in which I have had unusual difficulty, the conclusion to which I have finally arrived is that the preponderance of evidence and probability is in favor of the libellants, and that the decree must be in their favor.

*United States District Court, Eastern District of Virginia,
at Norfolk, June 30, 1880.*

BAIN & BROS. v. SHIP MINNIE L. GEROW.

■ *Held*, on the evidence, that one dollar per ton on the first 300 tons, and half a dollar per ton on the excess of tonnage over 300 tons is ample wharfage for large vessels in the port of Norfolk and Portsmouth; that being the customary rate, except among a few firms, who, though they had signed an agreement prescribing a larger rate, were proved not to have adhered to such larger rate.

LIBEL for wharfage in admiralty.

Walke & Old, for libellants.

Sharp & Hughes, for respondents.

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HUGHES, J. The claim here is for wharfage due from the libelled vessel. There was no agreement between the agent of the vessel and the wharf owners as to the amount to be paid. The charge was at the rate of one dollar per hundred tons per day, for 80 days, upon the entire tonnage of the vessel, which was 1,804 tons; or \$391.20. Deposit in the registry of the court has been made on behalf of the vessel at the rate of one dollar per hundred on the first 300 tons, and half a dollar per hundred the rest of the tonnage, for a period of 80 days, or \$240.60.

The only question is whether a dollar or a half dollar per day per hundred tons on the excess over 300 tons of the vessel's tonnage, is the proper charge. The decision must be controlled by the evidence in the case on this point. It is proved that the custom in Norfolk, in cases where no special agreement is made, is to charge half a dollar per hundred, after the first 300 tons. That also seems to have been the schedule rate observed in Portsmouth before 1874. Yet in respect to this rate, both in Norfolk and Portsmouth, all the witnesses who testified on the point, stated, that in cases where special rates were agreed upon, they were always lower.

In the year 1874, a new schedule of wharf rates was established as between themselves by eight owners of the principal wharves in Portsmouth. In that schedule wharfage on vessels was put down at one dollar per hundred on the entire tonnage of large vessels. The libel in the present case is by one of the firms who were induced to sign that schedule, and it claims wharfage in accordance with that schedule. It seems that there are but few wharves in Portsmouth at which very large vessels can be moored with convenience. Mr. Peters, the head of one of the few firms owning such a wharf, says that he never charges more than half a dollar after the first 300 tons, and that his firm refused to sign the Portsmouth schedule. Mr. Neeley, one of the firm whose name stands first on the Portsmouth schedule, says, that he has never charged and would not charge

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more than half a dollar. Mr. Bain, one of the libelling firm, says that he charges the schedule rate in all cases where there is no special agreement, and does not feel at liberty to "cut" the agreed rates. I think, on the whole, that the weight of testimony is, that a dollar per hundred on the whole tonnage of large vessels is too high; and I am inclined to infer, from all the circumstances, that it was through inadvertence that that particular item got, in the form in which it stands, into the Portsmouth schedule. The rates of both schedules for wharfage on large vessels, appear to me to be too high; but I am not at liberty to set my individual judgment in such a matter against that of leading business men of two cities. I was inclined, at the trial of this cause, to think myself concluded by the signatures appearing on the Portsmouth schedule; but, on reflection, the weight of evidence seems to condemn the charge there prescribed for wharfage on large vessels; and to show that, if it is adhered to at all by wharf owners, it is only, as in the present case, because they feel bound not to "cut" rates, agreed upon among the signers of the schedule. Indeed, it does not seem that many even of the signers of this Portsmouth schedule feel bound by their signatures to adhere to its charge for wharfage on large vessels, and I do not feel at liberty, therefore, to enforce that charge.

The amount deposited in the registry by the agent of the owners of the ship *Minnie L. Gerow*, must therefore be accepted as full compensation of the wharfage in this case, and I will so decree; but each party must pay his own costs.

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*United States District Court, District of Maryland,
July 6, 1880.*

GUIBERT & SONS v. THE BRITISH SHIP GEORGE BELL.

- * 1. Where a French fishing brig was sunk and totally lost in a collision with a British ship which latter was libelled in Baltimore and adjudged in fault, the measure of damages for the loss of the brig is what it would cost to replace her in France, although she could be replaced in Canada or the United States for a less sum.
2. Where the brig at the time of the loss had been fishing for three fourths of the season, an allowance of one fourth of the cost of her outfit for the season is a just item of damage.
3. In such a collision case, the rule of adopting the prime cost of the cargo at the place of shipment with the cost of loading and the cost of navigating the vessel to the place of collision is inapplicable; but, inasmuch as the fish caught up to the time of collision had no definite market value at that place, the true measure of damages for the loss of the fish in the brig when sunk is their value at the nearest French port where there was a market for them, without deduction for the expense of getting there.
4. In a case of total loss the probable earnings of the vessel for the remainder of the fishing season can not be considered in estimating the damages.

IN ADMIRALTY.

Brown & Brune, for libellants.

Brown & Smith, for respondents.

MORRIS, D. J. This libel was originally filed by the owners of the French brig Briha, a fishing vessel of 150 tons, against the British ship George Bell, 1,100 tons, for a collision which took place on the ninth of August, 1878, off the Grand Banks of Newfoundland, in consequence of which the fishing vessel was sunk, with the loss of two of her crew, and all the property on board. When the case came on for hearing, the court, (Hughes, J.) see 8 Hughes, 468, held that the ship George Bell was solely to blame, and the case was referred to a master to compute the damages.

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Exceptions are now taken to the master's report, and it is these exceptions which are now to be passed upon.

The first exception is to the sum allowed by the master as the value of the Briha at the date of the collision. The testimony shows that she was built in the port of St. Servan, in France, in 1876, for the libellants; and that she was especially built for the purpose for which she was being used; and that she cost, without paying any builder's profit, and without outfits, 43,600 francs; and that to have purchased her from a builder she would have cost 50,000 francs.

The proof shows that a proper allowance for deterioration from use is 10 per cent. for the first, and 5 per cent. for the second year. The testimony taken in France with regard to her cost, her superior solidity, and her excellent condition when she left France on her last fishing voyage, and as to the cost of similar vessels at the time of her loss, is satisfactory and convincing, and I am satisfied that she was worth to the owner all the master has allowed, viz., 40,000 francs, and that she could not have been replaced for less money.

Much testimony was taken to show that vessels of the same tonnage, which English and American fishermen consider superior to her for the business of fishing off the Grand Banks of Newfoundland, could be built or purchased for a considerably less sum in the United States or Great Britain or Canada; but what the libellants are entitled to have restored to them is a French fishing brig of the kind French fishermen are willing to use for the business, and as such vessels are constantly built in France for the purpose, and there is a regular building and market price for them in France, it is that price which is the damage the owners have sustained in losing the Briha. The report of the master is therefore sustained as to the value of the Briha, with the allowance of interest from the date of collision.

The next item of the report which is excepted to, is the allowance by the master of one fourth of the cost of the outfit for the Briha of those things required for the business of fishing and the provisioning of her crew which are

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consumed every season. The Briha, to the date of the collision, had been engaged three fourths of the season for which she was equipped, and therefore, as nearly as can be estimated, had consumed three fourths of her supply, leaving on board one fourth, which was lost by the collision. I can find no error in the method by which the master has arrived at the amount allowed by him, nor any defect in the proof in support of the items, except with regard to the salt. He has made a separate allowance of 825 francs for the estimated amount of salt remaining on board, but I am inclined to think that the cost of all the salt is included in account Exhibit D, which was filed by Maturin Auguste Guibert as a complete statement of the cost of the entire outfit of the vessel. I think this account includes the cost of all the salt. Guibert rested upon that account as a full statement of all his expenditures for outfits, and it was only when under cross-examination with regard to it, that, in support of the testimony given in chief, he details the exact amount and cost of the salt. This was a very considerable item of the outfits, and one which he would not probably have omitted in making up his account. The item of 825 francs is, therefore, not allowed. The other small items in this account, for custom-house charges, etc., which are objected to, I think the master has properly treated as part of the cost of sending out the vessel for the whole season's fishing, and one fourth of them is properly allowed under the head of "outfits."

The third item of the report, which is excepted to, is the price fixed by the master as the value of the cargo of fish, or, as it is called, the "catch," which were on board, and were lost by the sinking of the Briha. The master finds from the evidence that there were on board of the Briha, at the time of collision, 82,000 cod-fish, salted down in the hold of the vessel, averaging 45 quintals to the thousand, making 1,440 quintals of fish; the quintal being the French quintal of 55 kilograms, equal to about 114 pounds.

The value of these fish the master finds to be 25 francs, (say five dollars per quintal.)

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The testimony shows that in September, 1878, the price of cod-fish at Bordeaux, in France, green from the fishing vessels, coming from the Grand Banks, was 28 francs per quintal, (about \$5.50.) The testimony further shows that it is not unusual for the French fishing vessels to sell their first catch of the season at the French island of St. Pierre, off Newfoundland, near where the Briha was fishing when sunk, and that during the season of 1878 some of the French fishing vessels sold their first catch there at 16 francs per quintal, (about three dollars,) and that St. Pierre is a market for cod caught by French vessels, and that they are shipped thence to France.

The testimony of numerous witnesses of great experience in the principal fishing ports of New England and Canada, nearest to Newfoundland, proved that in those markets, in which cod-fish is an important article of commerce, \$1.75 per 100 pounds was the full value of such fish as were on board the Briha at the time of the collision.

The general rule is now well established that the value of a cargo lost by collision is to be ascertained by taking the cost of the cargo at the place of shipment, and adding the cost of loading it on board, and the cost of navigating the vessel to the place of collision. This is held to be the value of the cargo at the time and place of loss.

No matter how near the vessel may have reached to her port of destination, the market price at the port of destination is not allowed to enter into the estimate of the value, and all profits or probable benefits which would have resulted from the termination of a voyage almost completed, are rigorously excluded. *The Amiable Nancy*, 3 Wheat., 546; *The Lively*, 1 Gall., 814, (815;); *Smith v. Condry*, 1 How., 28; *The Vaughan and the Telegraph*, 14 Wall., 258, 267; *The Aleppo*, 7 Ben., 120, 124.

The difficulty in the present case arises from the fact that the fish, which constituted the cargo of the Briha, had been taken from the sea at the place of collision, and had no prime cost, and there was no market for them at the place of collision; yet they had a very considerable value,

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and represented a large expenditure of capital, time, labor, and risk of life and property.

This difficulty of applying the general rule confining the damage to prime cost at the place of shipment, and excluding all conjectural profits, has been met with in other cases which have come before our admiralty courts.

In several cases in admiralty, arising out of the tortious conversion of captured whales in the Arctic seas, there being no market near those regions for whales, or their products, the court has been obliged, in order to do justice, to ascertain the value in some market; and as New Bedford, although at a great distance, was the controlling market of the country, and was also the home port of the vessel, the market price at New Bedford at the time when the vessel suffering the loss could reasonably have reached there, less the expense of carrying the product there, was of necessity adopted by the court as the measure of damage. *Bourne v. Ashley*, 1 Low., 27; *Bartlett v. Budd*, Id., 223; *Taber v. Jenny*, 1 Sprague, 315.

The same rule was also of necessity adopted in the case of a collision between two whaling vessels in the Arctic seas. *Swift v. Brownell*, 1 Holmes, 467. The case of *Dyer v. The Nat. Steam Nav. Co.*, 14 Blatchf., 483, was a case in which a vessel loaded with guano, belonging to the republic of Peru, was lost by collision, having nearly reached New York, her port of destination. It was shown that all the guano in the Chincha islands was the property of the Peruvian government, which prohibited its exportation by any other than itself. So that, as it was never bought or sold at the place of shipment as an article of commerce, and cost the government nothing but the labor of digging and loading it on the ship, its prime cost at the place of shipment would be an insignificant sum, notwithstanding the fact that if the ship had proceeded safely a short distance further on her voyage, and had reached the port of New York, the cargo would have been worth \$60 a ton.

With these facts before it the court (BLATCHFORD, J.) was obliged to discover some reasonable method of apply-

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ing the rule, which, while it would exclude profits, would not deny substantial restitution to the party injured.

This the court did by deducting from the price in New York the expenses of the voyage, and an amount which the proof of experts showed would be considered by an importer a fair average profit for importing such an article.

The learned judge was compelled, in the absence of other data, to arrive at the price of the guano at the place of shipment by taking the market price at the place where it had a market price, and after deducting the expenses, and an average profit to an importer of similar articles, he treated the residue as the equivalent of the market price at the place of shipment. That is to say, the price which merchants would probably be willing to give for the guano for exportation at the place of shipment if it was possible to buy it.

These cases serve to show that it has been found impracticable to apply literally, in all cases, the rule allowing only the prime cost of the cargo at the place of shipment. In the case before me now it appears that the port of St. Pierre is a French port, near to the place of collision; that it is a market for cod, and a port where French fishing vessels quite commonly sell a portion of their "catch."

It also would appear from the testimony that there is some advantage of price there for fish caught by French vessels, and that American cod-fish are not salable in France. It would not, therefore, I think, be just to undertake to estimate the value of the "catch" of the Briha by the price of similar fish in the fishing ports of New England or Canada, but I can see no objection to taking the price at St. Pierre as a basis. It was the nearest French port, and one not distant from her anchorage at the time of the collision. It is a market for fish caught by French vessels for shipment to France; and I think the price obtained there must represent, as near as it can be in any way gotten at, the average cost to all parties concerned of catching and landing the fish there.

The great difference between the price at St. Pierre (16

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francs per quintal) and the price at Bordeaux (28 francs) has not been explained, and I think it must represent not only profit, but most probably considerable port charges or duties in France. Certainly, as the price in America for similar fish was not over 10 francs per quintal, 28 francs cannot be the actual value of the fish outside of France, with merely freight to Bordeaux added.

It has been urged with force that, as in cases of collisions, where there is freight actually contracted for, the freight then pending, less the expenses of completing the voyage, is allowed as part of the damages; and that in such cases as this, the fish themselves costing nothing, the price they would have produced in Bordeaux (which was the Briha's port of destination) should be regarded not as profit, but as the freight earned by the vessel and wages earned by the crew according to the several and respective shares of the vessel and the crew in the proceeds of the "catch."

It seems to me, however, that to adopt this rule would be to let in the very dangers and uncertainties sought to be excluded by the decisions directed against allowing profits in any shape. It could be invoked in every instance in which the owner of the vessel was also the owner of the cargo, and expected to make freight for his vessel by the profit on the cargo. It would open the door to all the uncertainties of a calculation based upon fluctuating markets and a conjectural termination of the voyage. As the Briha was near to the port of St. Pierre, and could have proceeded there without appreciable expense, I think the price there, viz., 16 francs per quintal, without deduction for any expense of getting there, should be allowed as the value of the "catch" which was lost, with interest from the date of collision. With regard to the sum allowed for the cod-liver oil, which is also excepted to, I think the finding of the master is the only one which the testimony supports, and I am also of opinion that the sums allowed by him for the clothing and personal effects of the master and crew have been sufficiently proved.

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The libellants excepted to the master's report because the sum allowed for the fish was not, in their judgment, sufficient, and also because the master disallowed their claim for the probable "catch" which with reasonable certainty they would have taken if they had been permitted to fish for the remainder of the season. The master reports that the testimony shows that there remained thirty days of the fishing season, in which with reasonable certainty those on the *Briha* might have taken 15,000 fish, additional to the cargo then on board. I think the master properly rejected this claim. It is clearly to be excluded, under the rule hereinbefore adverted to.

The probable earnings of a vessel have sometimes been considered in cases of partial loss in collisions, when there was no other means of ascertaining the loss to the owner by the detention of his vessel while being repaired; but, in cases of total loss, interest from the date of destruction is given in lieu of the profit which might have been gained by the owner by the subsequent use of his vessel.

[NOTE.—Since the decision of the above case, the case of *Dyer v. National Steam Navigation Co.* quoted *supra* has been passed upon by the supreme court of the United States. In their decision, rendered March 20, 1882, and reported in Vol. 4, p. 277 of Morrison's Transcript, they partly reversed the decree of the lower court on another point involved, but affirmed it on the question of the measure of damages which it is cited *supra* to sustain.]

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United States Circuit Court, District of Maryland, July 16, 1880.

MALSTER AND ANOTHER v. HUMPHREYS AND OTHERS.

*The launch of a ship newly-built into the waters of a crowded harbor is an event of such danger that the builder must be cautious to give ample warning to passing vessels. The mere hoisting of a flag on the vessel to be launched is not sufficient warning. If the vessel in being launched collides with a passing vessel whose crew is ignorant of the intention to launch at that time, the builder is responsible for the damage caused thereby.

IN ADMIRALTY. Appeal from district court.

John H. Handy, for libellants.

Savage & Semmes and *A. Sterling, Jr.*, for respondents.

The facts in this case are fully set out in the opinion of the district court, (filed October 22, 1879,) which is as follows:

MORRIS, D. J. This is a collision case of a peculiar character. As to the facts, there is but little, if any, dispute. It appears that on the afternoon of the first day of July, 1879, the schooner *Ridie*, of about 55 tons, with a cargo of assorted merchandise, started from the upper part of the harbor of Baltimore on her trip to Salisbury, on the eastern shore of Maryland, and, the wind being from the south-east, she was obliged to beat out; that having got about the Locust Point coal wharves she went on her star-board tack in a north-easterly direction, heading for a point on the opposite shore somewhere between Abbott's rolling mills and the ship-yard of *Malster & Reaney*, the respondents. She had nearly run out that tack, being about 200 yards from the shore, and was in the act of going about, being in stays, her sails not yet filled on her port tack, when

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she was run down and sunk by the hull of a vessel launched from the ship-yard of the respondents. The launch proved to be the hull of the propeller *Arbutus*, which the respondents had built for the United States government. There were on deck of the schooner, at the time, Captain Malone, the master; William H. Brewington, the mate; James Turner, a deck hand, who was forward working the jib and acting as look-out; and two passengers, George Twigg and Henry Messig. These all testify that no one of them had any knowledge, until too late to be of any avail to them in preventing the disaster, that there was to be a launch, and that there was no signal or warning of any kind given that attracted their attention until too late.

The first one of these who noticed the preparations and unusual collection of people about the ship-yard was the passenger George Twigg, who was standing forward with the look-out, Turner, and who testifies that just before the collision, and just as the schooner was in the act of going about, his attention was attracted by hearing hallooing on the shore, and he said to Turner that he thought there was going to be a launch, and almost immediately afterwards the launch started and struck them within about half a minute. Turner testifies that he observed the hull just about the time that the passenger Twigg called his attention to it, which was just as the schooner was going about, and when, if they had thought it necessary, it would have been too late to put the schooner back on her course; that he saw the people standing about in the ship-yard, and a flag on the hull, and some people aboard of her, but nothing to indicate that the launch was to take place immediately; that it was not over half a minute from the time he saw her until the hull started off the ways.

The other passenger, Henry Messig, a colored man, testified that he was also standing forward, and had been looking at the hull in the ship-yard for some minutes before the collision, but called no one's attention to it; that he did not see anything to indicate that the launch was to take place at that time until the schooner was in stays and the

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launch had started; that he was somewhat familiar with launches, having been several times present at them.

Captain Malone, who had the helm, testified that he had not heard that there was to be a launch, and knew nothing of it until he was in the act of going about, when the mate spoke to him and said he thought there was to be a launch, but not speaking as if it was to be immediately, or as a warning.

The mate testified that he did not notice anything going on in the ship-yard until the captain had put the helm down to go about, and he crossed over to the port quarter, and that he then noticed it and mentioned it to the captain, but that he did not think, and had no reason to think, the launch was to be immediately; that all he saw was a flag on the hull, and the people collected there, and about the same time he heard three whistles, but did not know what they indicated; that when he first observed the hull it was too late to have put the schooner back on her course.

There were other corroborating witnesses, but it is not necessary to notice their testimony, or to mention more in detail the facts testified to by the persons on the deck of the schooner, as the testimony of Mr. Malster himself, and the other witnesses for the respondents, give substantially the same account of the collision, and give more accurately the intervals of time between the events occurring just before the collision.

It appears, from the testimony of Mr. Malster and his witnesses, that it was generally understood about that part of the harbor of Baltimore, and had been noticed in the local items of the city newspapers, that he was to launch the government propeller *Arbutus*, a vessel of about 150 tons, from his ship-yard at Canton, at 4 o'clock on that afternoon; that he had a flag put upon the hull about 10 o'clock that morning, which is generally known to indicate a launch, and that early in the afternoon he gave instructions to have all the vessels anchored in dangerous proximity to the line of the launch notified to remove, which was done; that he had intended to launch at 4 o'clock, but

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waited until 5 for the tide ; that about 4 o'clock they began knocking away the props and bilge blocks, and wedging up the hull, and at 5 o'clock were all ready, and the vessel was only held back by two trippers, which are timbers so placed as to prevent the vessel moving until they are cut away ; that, being all ready and about to saw away the trippers, he looked out on the water, to be sure the course was clear, and he then saw the schooner Ridie steering in a diagonal course across the line to be taken by the launch, and then very near to that line ; that he called to his men to wait, although the hull had already begun to creak and show signs of uneasiness, and it was always a risky thing to do, to hold back a launch when she was prepared to let go ; that they did wait until he saw the schooner cross the line and get to leeward, when, having every reason in his own mind to suppose that she would continue her course and be getting further and further out of danger, he gave orders to cut away the trippers ; that the launch started very slowly at first, but when she got under way went very rapidly ; that the schooner did not, as he had reasonably supposed she would, keep her course, but immediately after crossing the line of the launch went about and came on to it again and was run down, although she might have continued her tack in the same course safely some 200 yards further in towards the shore.

He further testified that he had a steam-tug lying at the wharf, near the stern of the launch, ready to go after the hull and bring her back to shore as soon as she had lost the most of her momentum ; and that the use of hawsers or anchors to check the course of a launch was not by many ship-builders considered advisable, as many accidents occurred from the use of them, and that no hawser or line which it was practicable to use could have checked the Arbutus before she reached the point where she struck the schooner. The captain of the tug, who was one of the respondent's witnesses, testified that he was lying at the wharf at the stern of the launch, with the head of his tug out towards the water, and that he gave three blasts

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of his whistle just as the launch started, and one of the hands on the tug testified that just before the launch Mr. Malster called to him to go forward and hail that schooner and warn him off; that the schooner was then still on her starboard tack, heading for Tyler's wharf; that he did go forward on the tug, and hallooed, and continued to halloo until the tug blew her steam-whistle, but he could not see that any one on the schooner noticed him; that when he began to halloo the schooner had not reached the line of the launch, and when the launch struck the water the schooner had gone about and was in stays.

It is clear from the testimony that the schooner went not more than her length across the line of the launch before she went about, and that she must have started to go about, just as the launch got started on the ways. It would, therefore, appear that Mr. Malster, seeing the schooner about to cross the line of the launch, and knowing that if she continued her course she would be clear of all danger before the launch could reach her, (if the launch took the course he expected,) and feeling that every moment's detention of the launch was a great risk, and feeling confident, no doubt that the schooner either knew of the launch or would hear the shouting he directed to be made from the tug, he took for granted that the schooner would continue her course, without waiting to see her get so far clear of the line as that she could not get back on it in time to be struck. In so doing, no doubt, Mr. Malster acted as most ship-builders would have acted under the same circumstances.

There were many experienced men engaged in that responsible business produced as witnesses to testify as to the usual precautions at launches, and the tendency of their several experiences and methods was to show that the launching of a ship of any considerable size was an event which usually excited considerable interest in the neighborhood of the ship-yard, and about the harbor; that there was usually a considerable crowd of persons on the neighboring shores and wharves, and out on the water in boats, watching for it; that it usually became known by general report and

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local items in the newspapers, and that the only special notice to the public that the ship-builder gave was to set up a flag on the hull during the day, and to see that vessels lying at anchor in the course of the launch were removed; that vessels which might be passing at the time of the launch got notice and warning from the spectators who were waiting on the wharves or out in boats, and that any collision with a passing vessel was almost unheard of; that the moment of launching was a time of great anxiety and responsibility to the ship-builder and all in his employment, and usually absorbed all their attention, and that they never knew of boats being stationed off in the water to give notice to passing vessels, or of any notice other than that mentioned; that hawsers and anchors, when used, were rather for the purpose of preventing the hull from drifting too far away, and of furnishing the means of bringing her back to the shore, than of preventing her running into passing vessels.

It would not appear, therefore, that Mr. Malster set about the launching of this vessel with, for a ship-builder, any unusual inattention to the risk to passing vessels; but the court is not satisfied that he took such precautions as the law should require a man to take before he does an act so fraught with danger to others as to launch a vessel several hundred yards out into a frequented harbor where ships have a right to be sailing. There was, in reality, no notice at all given by him, which deserves in law to be so considered.

The respondents rely as notice upon the fact that there was a flag up on the hull, which they claim all sea-faring people know indicates a launch. By their own showing this flag was put up about 10 o'clock in the morning, and the actual launching did not take place until 5 P. M.; and it is claiming too much to say that the mere sticking up a flag is any sufficient notice to blockade the harbor of a great commercial port for a whole day for such a purpose. They rely also upon the fact that the preparations for launching involve pounding upon the sides of her hull to wedge her

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up, which makes a loud and peculiar noise, and which they say ought to attract any passing vessel's attention, and should be a notice that a launch was about to take place. But they themselves say that this driving of wedges began fully an hour before the actual launching, and it probably was concluded before the schooner got into the position where her crew would have heard it, even if they had known its significance.

They claim that, having before their ship-yard a large sheet of water, with a distance of perhaps a thousand feet to Henderson's wharf, which is in a straight line opposite, they were not to be expected to take precautions which ship-yards in more contracted places require. But this very extent of clear space turned out to be an element of danger, for the schooner having a perfect right to sail over any part of it, it was the most natural thing for her, as the wind then was, to make her long tack over into it; and if it had been narrower there would have been more chance that some spectator or boatmen near the launch, and who was doing nothing but watching it, might have warned them in time. As it was, those spectators who were nearest to the schooner, although at considerable distance from her, and who, having had information that the launch was to be at 4 o'clock and were still watching for it, state that, until they saw the hull moving, there was nothing which to them, at the distance they were off, indicated that the moment for launching had come. There was no gun fired, no whistle blown, no shouting heard, until after the launch had started. It can hardly be seriously contended, therefore, that any sufficient notice was given.

The captain and crew of the schooner state that they had no information or knowledge whatever with regard to any general expectation that there would be a launch that afternoon, and that they saw nothing until too late to put them on their guard, and the captain says he went about because he had run on that tack as far as he thought best to go, and that, although he could have gone further, he thought it more prudent in that part of the harbor not to do so.

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It is to be remembered that the respondent's ship-yard is not an isolated object on the shore, but it is surrounded by large manufacturing establishments, many of which are conspicuous objects, and, with the noise of their machinery, quite as likely to attract attention as a ship-yard.

When it is considered how slight a precaution would have entirely prevented all risk of such a disaster as the one which has given rise to this litigation, the neglect becomes more and more manifest. A simple tug-boat, the very one then lying idle at the ship-yard wharf, if stationed out in the stream just before the preparations for launching were completed, could have given positive notice and warning to every passing vessel not to go into the danger.

And no matter how many tugs it might require, or what other means might have to be adopted, it is clearly law and common justice that before a man can do so destructive and unlooked for an act as to launch a vessel out into a frequented fair-way, when confessedly he has no control whatever over her after she once starts from the ways, and cannot tell with certainty at what moment she is going to start, or what deflection from her expected course she may take, he is bound at his peril to see that every person is warned who otherwise might innocently, and without gross carelessness, suffer injury.

The building of ships is an enterprise worthy every encouragement; it calls into exercise the highest mechanical skill. The successful launching of a ship is an event of general interest and pleasure. The skilful ship-builder is among the most praiseworthy of citizens, directly contributing to national and local prosperity, importance and supremacy; but none the less is he bound by the same rules of care and precaution which the general interests of society has found it necessary to enforce upon every one of its members.

Coming to conclusions indicated by this review of the facts of this case, I am obliged to pronounce in favor of the libellants, and shall sign a decree sending the cause to a master to take an account of the damage sustained by them.

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The case having been carried to the circuit court on appeal, *Bond*, C. J. affirmed the decree and filed (July 16, 1880,) the following opinion :

BOND, C. J. This cause having been argued by counsel, and submitted upon an agreed statement of the evidence taken in the court below, and upon the facts stated in the opinion of the district court, the court finds the facts to be, that on the afternoon of the first day of July, 1879, the respondents were about to launch the hull of the propeller *Arbutus*, in the harbor of Baltimore ; that notice of the intended launch had been given in the newspapers by the local reporters, by which the public were informed that the *Arbutus*, a propeller of 150 tons burden, would be launched from the ship-yard of the respondents at 4 o'clock upon the afternoon of that day. A flag was put up to show the location of the ship-yard, and to indicate what was about to be done, and notice was given to all vessels anchored in dangerous proximity to seek safer anchorage. A steam tug was at the ship-yard for the purpose of towing the *Arbutus* back after her headway was gone.

The launch did not take place until 5 o'clock. At that time the schooner *Ridie*, of which the libellants were the owners, was beating out of the harbor, and just as she crossed the line of the launch went into stays.

The men of the ship-yard hallooed at her, and the steam-tug blew its whistle as a warning, but it was too late to prevent the collision. And the court finds the fact to be that there was not sufficient caution upon the part of the respondents, and that the collision was occasioned by their negligence ; that when a ship-builder is about to launch a vessel, and shoot her with the rapidity of a cannon ball across a crowded harbor, as that is an extraordinary and unusual proceeding, he is required to take extraordinary care, and exercise the highest caution, to prevent damage to those who are navigating that harbor. If the steam-tug, in this instance, had been steaming about to notify sailing vessels not to cross the probable line the *Arbutus* would take when she was launched, there would have been no likelihood of a collision.

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The court finds that the law, as applicable to the facts proved, is that when a collision occurs solely by the fault of a party, he alone must bear the loss and be responsible for the damages which occur. A decree will be passed in accordance herewith.

[NOTE.—In the case of the *United States* reported in Vol. 2, p. 166, of the Maritime Law Cases, which was an appeal to the Judicial Committee of the Privy Council from a decree of the High Court of Admiralty, and which was decided February 9, 1865, it was held :

“The U, a tug steamer, when being launched in the River Tyne, ran stern foremost into the starboard side of the steamer Otter, then passing down the river, and negligently being at that place :

Held, notwithstanding the O's negligence, the U might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and therefore, both being to blame, half the damage only was payable by the U.”

In the case of the *Blenheim* decided in 1846 and reported in 4 Notes of Cases, 493, the law of the degree of prudence required at a launch is also discussed.

In the case of the *Vianna* decided by Dr. Lushington on December 3, 1858, and reported in Swabey's Admiralty Reports, p. 405, it was held :

“A river being a public thoroughfare, must, as a rule, be kept open and free from danger for all ships navigating thereon.

On the occasion of a ship's launch, those in charge of the launch are bound to give the customary notice ; if there is no custom, then reasonable notice.

Reasonable notice in such circumstances considered.

The *Blenheim*, 4 Notes of Cases, 493, followed.

The party launching must prove that such notice was given.

Vessels navigating the river are bound to observe reasonable signals of an intended launch.”

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In the case of the *Glengarry*, which was a case in the Court of Admiralty decided February 9, 1874, and reported in 2 Asp. M. L. Cas. (N. S.) 230, it was decided:

"It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such notice as is reasonable and sufficient to prevent injury happening to other vessels from the launch, and the burden of proving that these things have been done lies upon them.

What is reasonable and sufficient notice depends upon local circumstances; the size and breadth of the river or waters in which the launch takes place, the amount of shipping, and other like things.

Where, in launching a vessel in a river, the usual precautions taken in that river have been taken, and the usual general notice that the launch is about to take place has been given, the persons having charge of the launch have performed all that they are required to do by law, and no specific notice of the exact moment of the launch is required.

In the river Mersey to give notice of a launch taking place, it is customary to have the ship dressed in flags for an hour or more before high water (about which time the launch takes place;) to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying; and there are usually a number of small boats lying off ready to pick up timber when the ship comes away."

As the above cases are contained in English Admiralty Reports which are scarce and very costly, it will not, it is thought, prove unacceptable to the Bar to embody the sylabus of each of them in the form of a note.]

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*United States District Court, Eastern District of Virginia,
at Norfolk, July 24, 1880.*

IN RE CARLISLE & SEED v. THE SCHOONER M. F. PARKER.

*Where a ship-carpenter makes for a proposed purchaser of a vessel an estimate of what he will charge for putting her in repair, on the faith of which the vessel is bought, and he afterwards charges much more than he estimated; a court will hold him to his estimate, in the absence of any satisfactory explanation of the excess of charge.

IN ADMIRALTY.

Starke & Martin, for libellants.

Sharp & Hughes, for respondent.

The evidence shows the following case: The schooner was about to be sold. The present owner Parker got Seed, one of the libelling firm, to examine the vessel and let him know what he could put her in good sailing condition for. Seed went upon the vessel, made the examination, and reported to Parker that the cost would be \$150. Afterwards Parker asked Seed to make another examination and say what he could put the vessel in good condition for; Seed again reported that it would cost \$150. Parker then bought the vessel at the price of \$315. After doing so he brought her to libellants' ship-yard and ordered them to put her in condition; but again asked what the cost would be, and was again told that it would be \$150. On this occasion, Parker called Rowley a witness up and said, "I want you to witness that Seed is to do this work for \$150." Rowley testified that Seed said in reply, "I would rather do it by the day's work," and pointed to another vessel at or near his yard, saying, "That is my last piece of job work." He said however, to Parker, "If it comes to less than \$150, done by the day's work, you shall have the benefit of it." Parker insists in his testimony that it was the understand-

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ing that the work was to be done by the job for \$150. After the work was completed, Seed presented a bill for \$356.22, which Parker refused to pay. It is in evidence that while the work was going on, Seed said to Parker who was often about the vessel, that "the bill would run a little over." There is no proof that any other work was done than was contemplated at the beginning; except some extra ironing and work incidental thereto, part of the iron for which was furnished by Parker; and it is admitted that the extra work, if it had been wholly done by Seed, was worth not more than \$50 or \$60. Otherwise, the libellants produced no evidence affording any explanation of the discrepancy between their estimate of \$150 furnished to Parker before the work was undertaken and their bill for \$356.22, or 133 per cent. greater, given after it was done. The owner, Parker, showed payments to the amount of \$56.45, which are to be credited on the bill of the libellants. After the libellants presented their bill to Parker, he offered to compromise by allowing \$60 in addition to the estimated \$150, that is to say to pay \$210, but the offer was rejected and the vessel was libelled for the whole sum of \$356.22.

HUGHES, J. I think that it is pretty clear from the evidence that Parker thought the job was to be done for \$150, and that Seed thought it was to be done by the job. As the minds of the two did not meet, I cannot treat the case as one of contract for the specific sum of \$150. Nor do I feel at liberty to treat the claim of the libellants as one purely of *quantum meruit* or *quantum valebat*. A vessel worth \$300 was about to be sold. A man ignorant of the cost of putting her in a proper state of repair, and thinking of buying her, applied to a firm who were in the habit of undertaking and executing such work, not merely for an opinion as to what it would cost to make the repairs; but for an estimate of what they themselves would make the repairs for. The firm gave that estimate, thereupon the vessel was purchased—purchased of course on the hypothesis that it would cost when ready for service, \$450. The men who

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made the estimate were then employed to do the work, and without offering any proof to explain the discrepancy, a bill was in course of time, presented for \$356; so that the purchaser found the cost of the vessel to be \$656, not much less than double what he expected it to be when he made his investment in that piece of property. Now a property which might be desirable and profitable at a cost of \$450, might be very undesirable and very unprofitable at a cost of nearly double that amount; and Mr. Seed, an expert in the building and repairing of vessels, has probably subjected Mr. Parker to serious pecuniary inconvenience and loss, either in first misleading him by a false estimate of the cost of repairing his vessel; or else in charging him more than double the amount which the repairs ought to have cost. It seems to me that this is a claim contrary to equity and good conscience. If it is not a case in every technical particular of estoppel in equity, or estoppel in *pais*, which I think it is, it is a case presenting too strong an equity in behalf of the owner of the vessel, to be disregarded by the court. If any reasonable explanation had been given by the libellants of the excess of their present claim over their previous estimate, the duty of the court to allow the claim might have been made clear, but none is given or attempted. The court is reduced to the dilemma of treating the estimate as the result of gross and injurious negligence or misrepresentation; or else, of treating the claim exhibited with the libel as grossly excessive.

I feel bound to hold the libellants to their estimate, with a liberal allowance for the extra work, which I will put at \$60. A decree may be taken for \$210, less the \$56.45 before mentioned; each party to pay his own costs.

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*United States District Court of the District of Maryland,
September 7, 1880.*

BJORKQUIST v. CERTAIN STEEL RAIL CROP ENDS.

- * Under a charter-party which provides that "the cargo to be loaded and discharged with all quick dispatch, as fast as the captain can receive and deliver," demurrage is recoverable for delay caused by the failure of the vessel to obtain a berth owing to the crowded condition of the docks, even though the charterers used all efforts to obtain a berth promptly and all dispatch in unloading after obtaining it.

IN ADMIRALTY. Libel for demurrage.

Brown & Smith, for libellants.

Cowan & Cross, for respondents.

MORRIS, D. J. The Russian bark *Bacchus*, of which libellant is master, was chartered to bring a cargo of steel rail ends from Antwerp to Baltimore. She arrived in the port of Baltimore on the fourth of December, 1879, and was ready to discharge on the 5th. The Baltimore & Ohio Railroad Company was to act on behalf of the consignees in receiving the cargo, and notice was given on the 5th to its foreign freight agent, who said that he already had information that the vessel had arrived, and had notified the holders of the bill of lading. The railroad agent referred the master to the company's wharfinger, who said there would be some delay, but that he would do the best he could, and would send a tug for the bark as soon as the berth for her was ready. The importation of iron had then recently very exceptionally increased in the port of Baltimore, and there was such an unusual number of vessels arriving to be discharged at the railroad wharves that berths could not at once be provided for them.

The railroad company promptly leased additional wharves and laid down tracks upon them, but could not give the

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Bacchus a berth until the ninth of December, and did not commence receiving the cargo until the afternoon of the 10th. The libellant frequently, from the first day of the detention, notified the consignees, protesting against the delay, and now claims in this libel demurrage for four days. The charter-party under which this cargo was shipped appears to have been prepared with unusual care. The parties would seem to have well understood the contingencies which might arise, and to have endeavored to provide against many of the disputes which do arise when such contracts are carelessly entered into. The stipulations with regard to discharging the cargo are as follows: "The cargo to be loaded and discharged with *all quick dispatch, as fast as the captain can receive and deliver*. If the berth at the railway pier at Baltimore is obtainable on vessel's arriving, the captain has no objection to discharge there—the freighter to have the option of keeping said ship 10 days on demurrage, over and above the said lay days, at £15 per day.

This makes a very different case from one in which the charter-party is silent as to the discharging of the vessel, or only provides for usual or customary dispatch. The charterers expressly agreed that the vessel should have quick dispatch in discharging, and that they would receive the cargo as fast as the master could deliver it. They took upon themselves the risk of being able without delay to provide a suitable berth, and they cannot excuse themselves by showing that they have used reasonable diligence and have discharged the vessel within a reasonable time, considering the crowded condition of the port. They made a definite and express contract, and they must show that they have complied with it.

The respondents have endeavored to show that even admitting the delay of four days in giving the vessel a berth, that the improved and peculiar facilities of the railroad for discharging iron into bonded cars, by which the delay of weighing it in smaller quantities by custom-house officers is obviated, fully made up the four days, considering how long it would probably have taken to have discharged the cargo

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at an ordinary dock. As to the facts on which this defense is based, I am not entirely satisfied; and, even if I were, I doubt if it could be properly maintained without showing some consent by the master to wait, in order to obtain the advantage of the improved facilities. No such consent is claimed. On the contrary, it appears that the master from the first, and almost from day to day, protested against the delay and urged his right to be at once discharged. He was entitled to have the iron taken away as fast as he could deliver it, and the fact that the consignees did fully comply with the contract as soon as they gave him a berth, is no justification of the delay in procuring one.

I pronounce in favor of the libellants for four days' demurrage at the rate of £15 sterling per day.

[NOTE. See *Evans v. The Tredegar Iron Co. post*, p. 401]

*United States District Court, for the District of Maryland,
September 7, 1880.*

PYMAN AND OTHERS v. VON SINGEN AND OTHERS.

* A steamer leaving for Baltimore in ballast on encountering heavy weather works loose some of the bolts of her shaft, and has to put into a port for repairs. The bolts on being taken out were found to be worn, but the preponderance of expert testimony was that the racing of the screw might have caused this, even though they were in proper condition at the departure. The charter-party contained an exception for delays caused by accidents to machinery. *Held*,

1. That the delay was within the exception, and the accident not a violation of the implied warranty of sea-worthiness.
2. That the failure to take rimers to bore out the bolt holes after they had worked out of shape, and extra bolts to fit them was not negligence on the part of the steamer; as it would have been almost impossible to make the repairs at sea, and it is unusual to go so provided.
3. That the charterers were liable for failure to load the steamer on arrival, although she arrived after the stipulated time.

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A. Stirling, Jr., for libellants.

John H. Thomas, for respondents.

MORRIS, D. J. On August 16, 1879, the British steamship Netley Abbey, 1,113 tons, was in the harbor of Newport, in England, near Cardiff, and on that day the agents of the libellants, who are the owners of the steamer, chartered her to the respondents, who are merchants of Baltimore, to come to Baltimore and load a cargo of grain for Great Britain or the continent.

The clause of the charter-party involved in this suit is as follows: "The said steam-ship being tight, staunch, and in every way fitted for the voyage, with liberty to take outward cargo to Baltimore for owner's benefit, shall, with all convenient speed, sail and proceed to Baltimore, where she guaranties to be in time for loading first half of September, 1879; the act of God, restraints of princes and rulers, dangers of the seas and navigation, accidents to boilers, machinery, etc., always excepted." The steamer had arrived at Newport from Carthagena, in Spain, on the ninth of August, with a cargo of iron ore, and having finished discharging that cargo on the twenty-first of August, and having taken on her coals and ballast, she proceeded to sea about midday of the twenty-third of August. She had moderate weather for the first twenty-four hours. Then the wind increased to a gale, with very heavy sea, which had continued for about twelve hours, when the engineer reported that some of the bolts connecting the after sections of the propeller or tunnel shafting were loose. The ship was hove to and the bolts were driven up, and the nuts tightened, and the ship started again at half speed. The heavy sea continued, causing the ship to labor, and the propeller to race.

About midday on the 26th, the bolts having again worked loose, the ship was hove to and the bolts taken out. They were found to be worn and the holes enlarged. Attempts were made to remedy the trouble by lining the holes and

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driving the bolts up tight, but upon starting the ship again and finding that the bolts did not remain tight, the engineer reported that it was not safe to proceed on the voyage. The ship was headed for St. Michaels, in the Azores, where she arrived on the 31st. Repairs to the bolts and bolt holes were at once made, working night and day, and the vessel was in condition to start again on her voyage on the third of September. She had the usual voyage from St. Michaels to Baltimore, arriving on the sixteenth of September, and was ready to receive her grain cargo on the eighteenth, having been delayed in all about seven days by reason of the accident and repairs. The charterers had engaged the steamer to carry a cargo of grain, which they were under contract to load during the first half of September, and as she was not ready to load within the time specified they refused to accept her, upon the ground that she was not delayed by accident to her machinery within the meaning of the exception in the charter-party; and they now allege in defense to this action, that the steamer was not seaworthy or fitted for the voyage when she started from Newport; that no examination of her machinery was made before she started on the voyage, and that very soon after she started parts of her machinery were found to be loose and out of order in particulars which could easily have been discovered and rectified if proper examination had been made and proper precautions taken before she started; and that the failure of the steamer to arrive in Baltimore in time to load during the first half of September was caused either by the condition of her machinery before she started on the voyage, or by the want of proper care, watchfulness, and skill during the voyage.

The bolts, the loosening of which disabled the steamer, are the pins which connect the sections of the shaft which operate the screw. It is a heavy shaft, made in three sections, which are coupled together by collars welded to each end, through which there are six bolts. The bolts in this instance were tapering, with the holes made to fit them, and were intended to be driven in and the nuts screwed

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further down, so as to tighten them up if they should work loose. The testimony of all the experts—marine engineers, quite a number of whom were examined on both sides—shows that if these bolts become at all loose there is an observable difference in the noise made by the working of the shaft, which is at once perceptible to an attentive engineer. It is insisted, on behalf of the steamer, that as the testimony shows that no such noise or jar was noticed, either previous to her anchoring at Newport, at the end of her last voyage, or when she started on the voyage to Baltimore, and not until she had been at least thirty-six hours at sea, it is evident that the bolts must have been tight when she started, and that this must be presumed, even though there is no testimony that the bolts were specially examined just previous to her starting.

The chief engineer, who had been on the steamer for six months, testified positively that the machinery was in good order at the end of the previous voyage, and that when the steamer started for Baltimore the machinery gave no evidence of being out of order, and that the least perceptible loosening of the bolts would have been noticed by him as soon as the machinery was in motion. The ordinary presumption is that a ship is seaworthy and her machinery in good order when she undertakes a voyage. The respondents, to rebut this presumption, endeavor to show that the machinery broke down soon after she got to sea, without any sufficient stress of weather or any extraordinary circumstance to account for it. On the voyage to Baltimore the steamer was carrying ballast merely. The weather was moderate for twenty-four hours, and during that time the machinery worked well. Then ensued a strong gale, with heavy seas, and the steamer being light her propeller was constantly lifted clear of the water, and meeting no resistance it revolved rapidly, commonly called racing, and when it struck the water again its velocity was suddenly checked. The effect of this, constantly repeated, was to bring an irregular strain upon the shaft, tending to loosen the bolts of the couplings; and when they are once loosened the tes-

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timony shows that the wear both upon the bolts and holes is very rapid. This is the explanation given by the officers of the steamer of the cause of the disabling of the machinery which delayed her.

The testimony of the numerous marine engineers who were examined as experts shows that this is an accident which seldom occurs, but there is proof that it has sometimes happened; and, while many express the contrary opinion, quite a number of these experts state that the circumstances of the voyage as detailed in the testimony of the officers of the steamer are sufficient in their judgment to account for the accident, even though the bolts had been in proper condition when the steamer started, and every care and precaution had been exercised. The Netley Abbey appears by the charter-party to have been built in 1878, and was therefore, at the date of the contract, not two years old, and it was hardly to be expected that her machinery needed such an examination, before starting on the voyage, as could only be had by taking the bolts out and replacing them; and as the shaft worked smoothly, without jar or noise, at the end of the previous voyage and at the commencement of this, I am not at all inclined to think that an examination in port, such as is usually made before starting, would have disclosed any looseness or defect, and I am not satisfied that under all the circumstances I should be justified in holding that the presumption of seaworthiness has been overcome.

The respondents impute to the libellants as negligence that the steamer was not provided with rimers for boring out the bolt holes after they had worked out of shape, and extra bolts to fit them, so that the difficulty might have been remedied at sea without putting into port.

It would appear, however, from the testimony of experts, that it would have been almost impossible to rime out the holes at sea, with the vessel in constant motion; and as it could not be foreseen what sized holes would result from the riming, a great variety of bolts would have to be provided, and they testify that such provision is never made.

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A question is raised in the answer of the respondents with regard to the validity of the charter-party. It purports to have been signed by certain ship-brokers in Philadelphia, who profess to act under cable authority from other ship-brokers in England, who are described as the agents of the owners.

It is shown by the testimony that the owners ratified the act of their ship-brokers by at once instructing the master of the steamer to proceed to Baltimore to load under the charter, and I think it sufficiently appears that the owners adopted the charter made in their behalf, and were bound by it and could have been held to its performance.

Upon consideration of all the testimony I am of opinion that the non-arrival of the steamer within the time specified was due to accident to her machinery within the meaning of the exception in the charter-party, and I will sign a decree against the respondents for the damages resulting to the libellants from their refusing to load the steamer.

United States District Court, District of Maryland. September 14, 1880.

BERTELLOTE v. PART OF CARGO OF BRIMSTONE.

* A charter-party provides "that the cargo is to be unloaded at the expense and risk of the charterers, according to the use and custom of the place of loading and discharging," and also for "prompt loading without loss of time, weather permitting, and customary lay-days for discharging." It being proved that it is the custom of the port of Baltimore not to unload brimstone on days windy enough to cause loss of the brimstone: *Held*, that such custom is not unreasonable, and that, under such a charter-party as the above, demurrage cannot be recovered for loss of time caused by such weather.

IN ADMIRALTY. Libel for demurrage.

Brown & Smith, for libellant.

C. N. West, for respondents.

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MORRIS, D. J. The Italian bark *Geromina Madre* brought to the port of Baltimore a cargo of over 900 tons of brimstone. She arrived April 24, 1880, commenced discharging on the 27th, and finished May 18th. This libel is filed by the master of the bark, alleging that he was detained in all 21 days, when 10 days would have been sufficient, with reasonable dispatch, to have discharged the cargo; and that the detention arose from the fault of the consignees and charterers, for which he should be paid demurrage.

The charter-party provides that "the cargo is to be brought along-side the vessel and taken away at the expense and risk of the charterers, according to the use and custom of the place of loading and discharging;" and also provides "for prompt loading, without loss of time, weather permitting, and customary lay days for discharging."

There being no definite number of days stipulated within which the cargo was to be discharged, and it being provided that the charterers were to be entitled to customary lay days, and there being no custom establishing any definite number of days, or rate per day, for discharging, the charterers have performed their obligations, unless detention has ensued from some fault of theirs, or neglect on their part to exercise reasonable diligence, according to the custom of the port. Under such a charter-party the owner of the vessel takes the risk of the weather being suitable, according to the custom of the port, for unloading the cargo, and the charterer takes the risk of being able to provide the proper transportation from the ship's side. *Sprague v. West*, 1 Abb. Ad., 548.

The proofs show that the vessel was first ordered to a dock at the Canton wharves, and that there was some delay in getting her to that place, but to this I find that the master consented for the reason that he was saved wharfage. I find that while at the Canton wharf the discharging went on with customary dispatch, and that there was no delay chargeable to the respondents. The proof shows that scows were in readiness to take the portion of the cargo to be

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discharged into them, and that there was no waiting for them; on the contrary, it would rather appear that the scow men complained that the crew of the bark worked too slowly, and did not give them the brimstone as fast as regular stevedores usually do. I find, also, that the removal of the vessel from the Canton wharf across the harbor, to Locust Point, was by agreement with the master.

It was at Locust Point that the principal detention took place. The libellant alleges that it resulted in great part from the want of a sufficient number of carts, and the constant delays in waiting for them. On this point there is some contradiction of testimony, but I think the preponderance is in favor of the respondents. The principal loss of time arose from the consignee refusing on parts of two days to receive the brimstone, alleging that the weather was too windy, and that so much of the brimstone was blown away in dumping it from the ship into the carts that he was subjected to loss. A further delay was in consequence of disputes, on two days, with the master, with regard to the payment of freight, resulting in his forbidding the discharging to continue until he was paid. Deducting the time lost from these two causes, and the average result per day does not tend to sustain the allegations with regard to the want of carts, contradicted as they are very positively by several intelligent witnesses. The respondents have proved that it is the custom of this port to stop discharging cargoes of brimstone when there is a high wind, as it is a substance liable to be blown away in the handling necessary to unlade it from a ship.

In a charter such as the one in this case the owner of the vessel is bound by the customs of the port to which he contracts to carry the cargo. This custom is proved, and it seems to me not an unreasonable one, although, undoubtedly, it is one likely to lead to disputes and possibly to abuse. The loss entailed on the consignee, which would justify the suspension of the unlading, should not be a trifling one, but should be in some measure commensurate with the usual loss from detention to which the vessels

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ordinarily bringing such cargoes to the port would be subjected. With regard to the violence of the wind on those days when the discharging was suspended, there is some conflict of testimony, but the testimony on behalf of the respondents is positive, while that of the master of the vessel is not convincing. The libellant, to corroborate his statement, produced the master of another Italian vessel, which was discharging brimstone on the opposite side of the harbor at the same time, and proved by him that on one of the days on which the respondents refused to receive brimstone on account of the wind the witness continued discharging all day. He says, however, that he did not himself pretend to judge of the force of the wind, and all he can say is that his consignee allowed him to continue discharging.

It appears, moreover, that his vessel lay in a position more sheltered from the wind, being on the north side of the harbor, and the wind being from the north on that day. From his testimony it appears, also, that he was 15 days discharging 550 tons of brimstone, which is a less average than was accomplished by libellant's vessel, which was 20 days, in all, discharging over 900 tons. The United States signal service report was put in evidence by the libellants to show that it was as windy on the days when the greatest number of tons were discharged as on those when the discharging was stopped, but as those reports give only the highest velocity during the 24 hours, they do not show the velocity during the working hours of the day. The report does show that it was what is considered windy weather, and that on the days when the discharging was proceeded with the wind was from the south, and on the days when the discharging was suspended the wind was from the north. At Locust Point the vessel would be sheltered from a south wind and exposed to the north winds.

Upon consideration of the testimony, and of all the circumstances attending the discharging of the cargo, I do not find that the vessel did not have customary dispatch, and the libel must be dismissed.

*United States District Court, for the District of Maryland,
October, 25, 1880.*

WOOD v. CANAL BOAT WILMINGTON.

The master of a barge having hired her to the libellant for the storage and transportation of grain in the harbor, and agreed to keep the barge in thorough repair and the libellant having procured a cargo to be put on board and having been obliged to pay the damage which the cargo suffered in consequence of a leak happening from the neglect of the master of the barge to keep her in repair,

Held, that the libellant was entitled to proceed *in rem* against the barge in admiralty to recover the damage paid by him.

Held, that as the master in hiring the barge to the libellant and in stipulating that she should be kept in proper repair was acting within the scope of his authority, the case was within the general maritime rule that whoever deals with the master is entitled to look to the vessel as his security and that the exceptions to that rule are not to be extended except for imperative reasons.

LIBEL in rem for damages to a cargo of grain loaded on a barge.

MORRIS, D. J. The libellant Wood made a contract for the use of the canal-boat Wilmington which is as follows:

"Charter-party. I, John Wood, on this 19th day of July, 1880, charter from Dominick Magrudy the boat known and called the Wilmington (of which the said Magrudy is master and owner) for the term of sixty days from date. The said John Wood agrees to pay the said Magrudy the sum of two hundred and fifty dollars for the above named sixty days. The said John Wood agrees to pay for the first caulking of the said boat, after which the said Magrudy agrees to keep said boat in thorough repair and to man and furnish her with all appurtenances."

The testimony shows that the libellant's well known business was to furnish to the grain elevators in the port of Baltimore barges suitable for carrying grain which they

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needed when the elevators were full and which they used principally for storage and incidentally to carry the grain to ships which they desired to load in different parts of the harbor.

This was the purpose for which the barge was to be used in the present case and was well understood by both parties. The owner of the barge lived in Philadelphia, but the master of the barge who had brought her to Baltimore had authority to make the contract.

Under this contract her deck was recaulked at the libellant's expense which the master said was all the repairs she required. She then was twice loaded with grain which she carried across the harbor and discharged into steamships. Then she was loaded at one of the elevators and lay about ten days when she began to leak. The grain was taken out of her uninjured and her master was told that she would not answer as she was too leaky to carry grain. The master then took her away, had repairs put upon her, and brought her back, saying to libellant that he had found the leak and fixed it and now the boat was all right. She was again loaded at one of the elevators and moved near to another and there lay eight days, when she sprung a leak in the night time and damaged her cargo very considerably.

It is for this damage which the libellants had to make good to the Elevator Co. that he brings this libel against the barge.

After the grain was taken out of her the master had her hauled on the dry dock for repairs, when it was found that the oakum was out of her seams in half a dozen places and he was obliged to have her entirely recaulked and repaired.

By the contract it was agreed by the master that the boat should be kept in thorough repair, and from all the testimony I have no difficulty in finding that the damage resulted from a breach of this agreement.

Although the contract recites that Dominick Magrudy was master and owner he was in truth master only and Mrs. Ann Magrudy of Philadelphia was the owner. She makes claim to the boat and besides defenses to the merits and facts

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of libellant's claim she denies the jurisdiction of this court to take cognizance of the case and denies the libellant's right to maintain a proceeding *in rem*.

It is now, however, I think, quite well settled that canal boats, lighters, barges, floating elevators and similar floating contrivances used in harbors as instruments of commerce are in like manner as sea going vessels subjects of admiralty jurisdiction, and that contracts with regard to their employment and repair are maritime contracts and matters of admiralty cognizance.

5 Benedict, 60, *Canal Boat Kate Tremaine*; 5 Benedict, 72, *Canal Boat W. J. Walsh*; 8 Benedict, 150, *Canal Boat E. M. McChesney*; 8 Benedict, 556, *Floating Elevator Baldwin*; 9 Wallace, 526, *The Northern Belle*; 3 Federal Reporter, 411, *Edner v. Gregg*.

Under the contract in this case the canal-boat could have been used for any of the purposes for which such a vessel is suitable, and she was in fact used in two instances to carry grain across the harbor.

The fact that the principal use to which it was expected she would be put and for which she actually was used was to hold grain on storage until the elevators were relieved, does not, in my judgment alter the rights of the parties.

In *Rupper v. Robinson*, Taney's C. C. Decisions, 498, it is said "the manner in which the vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character. If the repairs fitted her for navigation of the sea the contract was maritime; and it does not rest with the owner to confer or take away admiralty jurisdiction at his pleasure by the mode or trade in which he afterwards employed her."

The objection to the libel most strongly urged is to its character as a libel *in rem*.

It is urged that a contract such as the present one, makes the libellant the owner of the boat during the term of the contract. That she was hired to him absolutely for sixty days; that he was to have complete control, possession and command of her; and that as under such a contract the

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owner would have no lien on the cargo for the hire, the charterer should have no lien on the vessel for damages resulting from her unseaworthiness or other breach of the charter by the owner.

That where the charterers have the possession and control of the vessel, the owners have no lien for their hire is indeed settled. *Drinkwater v. The Brig Spartan*, 1 Ware, 149. The parties in such case have voluntarily entered into a contract the effect of which is held to be to remit the owner to the personal responsibility of the charterer. The charterers have a lien on the cargo and to allow a lien to the owner also might be to endanger the property of innocent shippers having no notice of the contract.

But the rule of the general maritime law is that every contract made by the master within the scope of his authority binds the vessel and gives the creditor a lien on it for his security. *The Phebe*, 1 Ware, 271; *The Paragon*, 1 Ware, 822. And the exceptions to this rule are not to be extended unless for imperative reasons.

There is high authority for saying that even where the whole vessel is demised or let to hire, a shipper may have a lien on the vessel. In *The Phebe* it was held that the shipper might proceed against the vessel, notwithstanding she was let to a hirer who was to have sole control of her and notwithstanding the shipper would have no remedy *in personam* against the owner. *The Phebe*, 1 Ware, 271; *The William & Emmeline*, Blatch. & How., 71; *The Schooner Freeman*, 18 Howard, 182.

I can see no sound reason why the present case should be held to be an exception to that general rule, inherent in the maritime law, by which, whoever deals with the master within the scope of his authority, is entitled to look to the ship as his security, and I have been referred to no case which so decides.

In this case the master knew better than any one the age and condition of his boat and her fitness to carry grain without injuring it. He undertook to have the repairing done to make her fit after she had once sprung a leak. He

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was to remain on board of her to watch her and her cargo and keep her wells free of water. He had expressly stipulated with the libellant to keep her in thorough repair, and I fail to see why the boat should not be held liable *in rem* to the libellant for damages to a cargo resulting from a breach of this stipulation, which cargo the libellant, relying on this stipulation, had procured for her and which damage he was answerable for and has paid.

Upon the theory that this was an absolute demise of the boat and that the master was in the employment of the charterer and not of the owner, it is contended that the owner is not responsible for the neglect and defaults of the master in allowing the leak to get such headway as to injure the grain. But the master, who was offered as a witness by the respondents and not by the libellant, denies that he was negligent and declares that he was constantly on board diligently attentive morning and evening to pumping the boat, and states that when the leak started it gained so rapidly that no exertions could stop its gaining. Therefore, even though he is regarded as the servant of the libellant, the respondent's testimony acquits him of fault.

There is no contention, however, but that when the master made the contract and stipulated to keep the boat in thorough repair, he was acting on behalf of the owner and within the scope of his authority and also that he was so acting when, the boat having been once rejected as leaky, he took her to be repaired and subsequently returned her, saying she was all right and ready for loading.

The owners of barges to be used for grain have been held by the admiralty courts very strictly to the duty of keeping their boats tight, strong and in every way fit for the purpose for which they are used, that is to say, so that the water shall not reach the grain. The supreme court has said that if they are incapable of this they are not seaworthy and that there is no other test. *The Northern Belle*, 9 Wallace, 526; *Kellogg v. Packet Co.*, 8 Bissell, 496.

In this case the whole purpose and meaning of the stipulation that the owner should keep the boat in thorough re-

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pair was nothing more nor less than, that while subjected to only the ordinary risks of her employment, she should not so leak as to injure her cargo.

I pronounce in favor of the libellant; but as the testimony with regard to the loss on the wet grain was not entirely satisfactory, unless the parties can agree on the amount, I will send the case to a master to compute the damages. I think it should be shown with more accuracy than was done at the hearing, how much the grain which was wet was depreciated in value.

*United States District Court, Eastern District of Virginia,
at Norfolk, November 8, 1880.*

THE SCHOONER D. B. STEELMAN.

1. Where a half interest in a vessel was owned by a married woman as her separate estate, by virtue of a law of the place of her residence, her husband can libel the vessel for funds and repairs furnished.
2. Where a material man, having a considerable claim against a vessel on an account running through several months, some items of which were not maritime, took cash for part of the amount, and notes at short dates for the residue, and a mortgage on the vessel to secure the notes;

Held, that the cash payment must be applied to the extinguishment of the items not maritime;

Held, also, that the notes, having been taken at short dates did not waive the lieu of the amounts for which they were taken;

Held, furthermore, that the mortgage, being recent, and not prejudicial to other maritime liens, and attended by no acts inconsistent with the rights of other maritime conditions, did not waive the maritime lien.

3. This case distinguished from the *Ann C. Pratt*, 1 Curtis, 340; and the *Swallow*, 1 Bond, 189.

4. The order of distribution among different maritime claims under the special circumstances of this case indicated.

Walke & Old, for the mortgagee.

Sharp & Hughes, Ellis & Thom, White & Garnett, for the various petitioners.

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HUGHES, J. The schooner D. B. Steelman of Baltimore, Maryland, has been libelled in this court by three of her seamen: and sundry material men and other claimants have filed petitions setting out claims against the vessel. By general consent the vessel has been sold and the proceeds paid into the registry for distribution. These are insufficient to meet all the claims.

Of course the first charge against the fund, is the costs of this suit. Next in order of priority are the claims of the seamen. They were hired by the month in Baltimore; and as the vessel laid up in this port without finishing her voyage, they must be paid their wages for the time claimed, and a dollar and a half each for their passage back to Baltimore.

The vessel was owned by J. Hexter and his sister, Mrs. Silverberg. Under the laws of the District of Columbia, where Mrs. Silverberg lives, married women may acquire and hold personal and real property in separate right free from the control or obligations of their husbands. Her half of this vessel is thus held and owned by Mrs. Silverberg; as is shown by the schooner's custom house papers issued by the collector of Baltimore. One of the claimants by petition in this case is Silverberg; who claims expenses incurred in repairs upon this vessel and in funds and supplies furnished her. I see no reason why this claim should be denied. It is proved in the usual way, and is admitted to be just and correct by the other half-owner, Mr. Hexter. It cannot therefore be invalidated by the mere fact that the claimant is the husband of a half-owner. It must be paid *pari passu* with other claims of like dignity.

It seems that the petitioner McCullough, in March and April last, furnished lumber and money for repairs upon the vessel to the amount of about \$635, of which he received \$300 in cash; and took notes at sixty days, ninety days, and four months for the balance. The items making up the total of the account which he files with his petition, bear date from February 10, 1880, to April 5; and it is claimed by adverse counsel that the payment of \$300 made

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to him by Hexter, an owner, should be applied to the discharge of the earliest of those items. This would leave among the items of later date, some which have not the force of maritime liens. There was but one refitting and repairing and supplying of this vessel by McCullough, which was during a single stay of the vessel in this port; and his advances to her were made with reference to the total charges incurred on that occasion. The cash payment which he received must therefore be presumed to have been paid and received in liquidation *pro tanto*, first of the items which had not the force of maritime liens; and then, of those which had. Any other rule of application would be contrary to reason, and be grossly inequitable.

Besides executing three notes for the balance of \$335 due upon McCullough's advance, Hexter executed a mortgage upon his half of the vessel to secure the amount of the notes. The principal question arising in the present case is, whether McCullough, by taking the notes, and especially by also taking this mortgage, waived his maritime lien upon the vessel, and thus falls behind the other material men in the order of payment. I think it may be assumed as settled law that the taking of a note by a material man in evidence of his claim for supplies, for such short time as sixty, ninety or a hundred and twenty days, does not of itself amount to a waiver of his maritime lien upon the vessel supplied. *The Nestor*, 1 Sumner, 78. The only open question is whether the taking a mortgage on the vessel securing this note is a waiver. It is settled law that a mortgage is to be treated not as the debt but as a mere incident of it; not as the principal thing, but as the mere accessory. 1 Jones on Mortgages, § 11; *Carpenter v. Logan*, 16 Wallace, 271; and see 22 Albany Law Journal, 377.

If a mortgage be thus but an accessory and incident of the note, and the note itself does not displace the maritime lien upon the vessel, then the mere fact of taking a mortgage does not operate as a waiver of the maritime lien.

If however the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other mari-

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time creditors; for instance, if the credit given by it be so long as to make the claim it is intended to secure *stale* in the sense of the maritime law; or, if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage; then it would be inequitable to allow to the mortgagee the benefit of two remedies against the ship; and his taking the mortgage would be held as waiving the maritime lien.

I see nothing in conflict with this view in the cases of the *Ann C. Pratt*, 1 Curtis, 340, and *The Swallow*, 1 Bond, 189, cited by adverse counsel. In the case of the *Ann C. Pratt*, which belonged to Frankfort, Maine, there was a loan of money on a bottomry bond while the vessel was at St. Thomas, during a voyage to the West Indies. It was in proof that the lender was unwilling to furnish funds except on a bottomry bond, or to deal upon any other footing than a contract of bottomry; and that both parties contracted solely with reference to such a bond. The lender of money upon a bottomry bond takes a very different risk from that of a material man who furnishes supplies; and he charges for this risk a very high remuneration; so that the lien of a bottomry bond is in terms and in its character so inconsistent with the ordinary maritime lien as to operate as a waiver and displacement of the maritime lien. The decision of Justice Curtis, in the case of the *Ann C. Pratt*, is based on this difference; and exclusively on this difference under the express contract of the parties in the case. And it is to be remarked that in rendering this decision on special grounds, Mr. Justice Curtis reversed Judge Ware, one of the soundest maritime jurists known to the American admiralty judicature.

The case of *The Steamboat Swallow*, 1 Bond, 189, was decided in Ohio, where the statute law of the state, gave to material men a remedy by attachment in the state courts against vessels which they credited. The state law provided a different order of priorities in these suits from that of the admiralty law for claims against vessels. In the case

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of the *Swallow* several creditors had pursued their remedy against the vessel in the state court to judgment, and had obtained by that means all that could be awarded them under the state law by the state court.

There was afterwards a libel in admiralty brought by different claimants against the same vessel. The fund arising from the sale of the vessel under the admiralty decree was sufficient to pay off the claims of the libellants and to leave a surplus for distribution among claimants, some of whom claimed and some of whom could not claim maritime liens. Among those who asserted claims by maritime liens to the surplus were some who had originally valid maritime liens for supplies and repairs, but who, instead of enforcing their claims in the admiralty court, and insisting on their maritime liens, had proceeded in the state court under the water-craft law of the state of Ohio, and obtained judgment in that forum. It was held that the pursuit of a maritime claim in a state court was a waiver of the maritime lien; that this lien having passed into the judgment of the state court had been thereby waived and lost; it being clearly consonant with reason and the analogies of the law, that, if a party, having an undisputed maritime lien, voluntarily waives it, by seeking another remedy incompatible with it, he cannot be reinstated in his original right. *The Steamboat Superior*, Newberry, 176, which was cited by the court.

The case at bar is quite different in character from that of the *Ann C. Pratt* and *The Steamboat Swallow*. It is not the case of libel on a bottomry bond. It is not the case of a voluntary abandonment of the remedy in admiralty for a resort to the inconsistent and different remedy of attachment and personal judgment in a state court. Nor in this case has there been a sleeping, by the claimant, upon his mortgage, so long as to allow his claim to grow stale, to the prejudice of the rights of maritime lien creditors whose claims are fresh. I hold that the mere taking of a mortgage is not of itself a waiver of the maritime lien, and that there is nothing in this mortgage or the conduct of the mortgagee to

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displace or waive the maritime lien of McCullough for advances and materials furnished to the vessel.

As the schooner belongs to Maryland, the claim of Joseph H. Johnson a citizen there for repairs done in that state, is not a lien except under the terms of the law of Maryland relating to that subject; which is as follows:

Revised Code of Maryland art. 67, sec. 44, Act of 1865, chap. 119.

"All boats or vessels of any kind whatsoever belonging in this state or used or intended to be used on the waters of the Chesapeake Bay or its tributaries, the Chesapeake and Ohio canal and other waters of this state, shall be subject to a lien and bound for the payment thereof as preferred debts for all debts due to boat builders, mechanics, merchants, farmers or other persons from the owner, master, or captains or other agents of such boats or vessels for materials furnished or work done in the building, repairing or equipping the same."

Sec. 45. "No person shall be entitled to a lien unless he shall within six months from the commencement of the building, repairing, equipping or refitting of such boat or vessel, deliver to the clerk of the circuit court of the county where such building, repairing, etc. was done, or the superior court if done in the city of Baltimore, an account or statement certified by the oath of the claimant * * * setting forth the names of the claimant and debtor and if the debt was not contracted by the owner but by his agent, the name of such agent, the name or other certain description of the boat or vessel, and the place where built, repaired, etc., and the particulars or items of the claim or debt.

Sec. 47. Such boat or vessel against which an account or statement shall be filed under this article, shall be subject to a lien for the debt and costs justly chargeable against it for two years from the day on which the account or statement shall be filed, and no longer.

Sec. 48. The lien given by this article shall not entitle the claimant to preference over creditors or claimants secured by mortgage or bill of sale properly executed and recorded before the claim to be secured by such lien shall have accrued.

The claim of Johnson as to the half interest in the vessel upon which McCullough has a mortgage, ranks under this law after or behind the mortgage. But as to the half interest in the vessel on which there is no mortgage, it must be paid *pari passu* with the claims of other material men including McCullough.

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This difference in the manner in which the Maryland claim ranks, as to the different half interests in the schooner, makes it necessary that the commissioner shall divide each of the claims of the material men into two parts. As to the first half of these several claims, (the first half of the Maryland claim being wholly displaced by the mortgage,) they must be paid the percentage which half the fund subject to distribution will permit, I believe about 95 per cent.

As to the other halves of these several claims, including half of the Maryland claim, they and it are to be paid in the percentage which the half fund for distribution bears to the aggregate amount of them, I believe about 74 per cent.

I will sign a decree allowing the amounts indicated.

[NOTE.—In the case of *The Antarctic*, 1 Sprague, 206, Judge Sprague held that where there are two debts, one secured by a lien and the other not, and a general payment is made by the debtor, the law will appropriate it to the extinguishment of the debt secured by the lien. This is in conflict with one of the points decided in the above opinion. Nor can the question whether taking a mortgage on the vessel for a maritime lien is a waiver of that lien be regarded as settled on this point. See *The Wexford*, 7 Fed. Rep., 674; *The Maggie Jones*, 1 Flippin's Rep., 635.]

Syllabus.

*United States District Court, District of Maryland,
November 8, 1880.*

TILLMORE v. MOORE, OWNER, AND ANOTHER.

- * 1. A parent may maintain a libel in admiralty for the enticing away of a child under age by the master of a vessel.
2. Where the master is running the vessel as agent of the owner, the libel will lie both against him and the owner; but where the master is owner *pro hac vice* and has sole control of the management of the vessel, he alone is liable.
3. The measure of the parents' damages in such a case is the loss of earnings and services consequent upon the abduction, and disabilities of the child arising from exposure, and the expense of curing the child of sickness brought on by such exposure.

IN ADMIRALTY. Libel *in personam*.

Applegarth & Hagner, for libellant.

I. A. L. McClure, for respondents.

MORRIS, D. J. This is a cause of damage brought by the libellant against the owner and master of the schooner Thomas W. Moore, for damages for the abduction and ill-treatment of her son, Henry Johnson, a youth of about 16 years of age.

The libel alleges that libellant is the only surviving parent of her said son, and entitled to his services and wages, and to have care and custody of him; that about September 26, 1879, her son was shipped on board said schooner, (then employed in dredging for oysters in the Chesapeake bay,) without her knowledge and consent, and detained in said employment until the 8th of March following; that her son was, during that time, exposed to the rigor of a severe winter, endured great hardships, was frequently beaten and cruelly treated by said master, and allowed to suffer for want of proper food and medicines, and that when discharged he was badly frost-bitten and sick, and is still disabled from

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work; that, in consequence, libellant was put to expense for his cure and medical treatment, and is still deprived of his earnings, and is advised that he will never completely recover his ability to labor.

The libellant is a colored woman, living in Washington, and the proof shows that her son, when shipped on respondent's vessel, was about 16 years of age, and was living with his mother, and gave to her whatever he earned at any work he could get to do. It appears that he, together with several other colored boys, were induced by a colored man in Washington to leave their homes and come with him to Baltimore, and were there taken by him to the office of a man who procures seamen for oyster vessels, where, the respondent Lewis being present, they signed shipping articles to serve Lewis during the oyster season at seven dollars per month on any vessel he should designate. They received seven dollars apiece advance, which was taken by the man who shipped them, and then they went at once aboard the schooner *Thomas W. Moore* and proceeded down the bay on her, the respondent Lewis being master in command. Lewis employed the schooner in connection with two other oyster vessels on the Chesapeake, each taking its turn to bring the whole catch of oysters to Baltimore, and the other two remaining to continue dredging. Johnson, the libellant's son, was transferred from one of these three boats to another during the whole oyster season, and did not get back to Baltimore for some five months after he was shipped. He then at once returned to his mother in Washington. She had known nothing of his intention to leave his home, and, having been unable to learn anything about him, had suffered great anxiety, and had given him up for dead. His feet and hands were badly frost-bitten, and he had a severe cold. His mother was obliged to nurse him and have a physician attend him for about two months, and at the time of the hearing (September, 1880,) he had not entirely recovered his strength, and was somewhat crippled in his feet.

That a parent may maintain a libel in admiralty for the

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wrongful abduction of his son and carrying him to sea is well settled; and also that for such a tort committed by the master the ship-owner would be liable as well as the master, if the master was in command of the vessel as his agent; but where the master is owner *pro hac vice*, and not commanding the vessel as agent for the owners, they are not in such cases held personally liable for his torts.

I find that in this case the master had the possession, control, and management of the vessel, and was to man and victual her. He paid, as hire to the owner, a proportion of her gross earnings, but the owner had no control over her employment. So they both testify, and that the owner's share of the vessel's earnings were usually deposited for him by the master, with a merchant in Baltimore, and that for months at a time he knew nothing of the vessel's whereabouts, and that he knew nothing of the shipping of this boy. I think, therefore, that, as against the owner the libel must be dismissed.

I come, then, to consider the merits of the case against Captain Lewis, the master. Looking at all the testimony in the light most favorable to him, and giving him the benefit wherever there is any conflict of testimony, there is no doubt in my mind that he is shown to have knowingly committed a wrong against the libellant, for which he must respond in damages.

The boy, Johnson, claims that he stated in Captain Lewis' presence in the shipping office that he was under 21 years of age. Captain Lewis denies this, and swears that the first he knew of it was when Johnson told him he was under age after he had been two days on board, and that Johnson then said that the men who shipped him persuaded him to say he was 21, and told him he would get more wages if he would say so.

I think that in this Captain Lewis has told the truth, and I am not all disposed to think he would have taken the boy if he had said, in the shipping office, that he was only 16; but, conceding this to be so, and also that there was nothing in the boy's appearance that should have suggested inquiry,

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by his own admission he had notice of this boy's age two days after they sailed. Johnson says that at that time he told the captain how he had run away from home, and that he wanted to write to his mother and return to her. The captain could not have at once returned him; but the testimony shows that at least every two weeks one of these three vessels, which were oystering together, came up to Baltimore.

The captain not only did not return him, but kept him for five months, requiring him to work, first on one boat and then on another, at labor of the hardest kind, subject to great exposure, during all the winter months. He paid no attention to the request of the boy to be allowed to return home. He made no inquiry to see if his statements were true, and he allowed the mother to remain in ignorance with regard to her son, and a prey to prolonged anxiety.

Continuous service on an oyster vessel in the Chesapeake, during the winter months, involves labor and exposure which hardy adults are none too able to endure, and no contract requiring it should be made except with those who fully comprehend what they are undertaking. To keep such a youth as Johnson, unused to exposure and hard labor, for five months in such service, was to risk his health and his ability during the rest of his life to earn his living by labor. I throw out of consideration all Johnson's allegations of constant beatings and of insufficient food. His testimony in these matters is not supported by any other witness and is contradicted by several. He had never before been on a vessel, and I have no doubt that his natural slowness and want of familiarity with the duties expected of him brought upon him some rough treatment, which he has exaggerated, and in this action, except for wrongs the consequence of which have resulted in pecuniary loss to the mother, no recovery can be had. The testimony of the libellant and the physician who treated Johnson establish that he returned home badly crippled with frost-bitten feet and hands, and suffering the effects of a very

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severe cold, all the result of exposure, and that he required careful nursing and treatment for two months, and six months afterwards, at the time of the hearing, was not entirely well. It also appears that of the seven dollars a month he was to receive, the seven dollars advance went to the men who procured him for shipment, and nearly all the balance was retained by the master to pay for the necessary clothing supplied to him during the winter, so that when he was discharged there was coming to him in money only \$3.75. He brought none home with him.

The pecuniary loss to the mother has been the expense and labor she has been put to in curing her son of the sickness brought on by his exposure, and the loss of his earnings and services consequent upon his abduction and subsequent disabilities.

As all the parties concerned are in very humble circumstances, it is not my purpose to award any large sum as damages. A large sum would more than compensate the mother for actual pecuniary loss, and would probably be ruinous to the respondent. Under all the circumstances I think \$150 the proper sum to be allowed.

United States District Court, District of Maryland, November 8, 1880.

VON LINGEN AND OTHERS v. DAVIDSON AND OTHERS.
(Libel.)

DAVIDSON AND OTHERS v. VON LINGEN AND OTHERS.
(Cross-Libel.)

- *1. The words "about to sail" in a charter-party for a ship chartered whilst loading at a distant port construed to mean "about ready to sail;" it appearing from the evidence that the parties wanted her for a special purpose within a month from the date of the charter-party,

Facts found by the Court.

and that this was understood by both parties at the time of making the contract.

2. The warranty of prompt departure implied by the above words is broken, when the ship at the date of the charter-party has received only about one-fourth of her load and did not sail till nearly a week afterwards; and the ship-owners are responsible for any damage to the charterers caused by her late arrival.

FACTS FOUND BY THE COURT.

(1.) The British steamer *Whickham*, owned by T. H. Davidson and others, the defendants in the original libel, sailed from Shields on the ninth of July, 1879, bound for Lisbon, where she arrived on the 16th, and, having discharged her cargo, sailed again in ballast on the 23d for Benizaf, on the coast of Morocco, to take a load of iron ore under a charter for Philadelphia. She passed Gibraltar on the 25th, and arrived at Benizaf at 4.30 P. M. of Saturday, the 26th. She began taking in cargo under the charter for Philadelphia during the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons, but on the 30th none, and on the 31st only four boat loads. During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the seventh of August, at 5:30 P. M. An hour later the vessel sailed, and, stopping five hours at Gibraltar for coal on the 9th, arrived at Philadelphia on the 2d of September. She completed her unloading at that port on the 7th.

(2.) The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons burden each. It is then passed up the ship's side in baskets. Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is the only way of loading such cargo at that port.

(3.) About the first of August, Gregg & Co., a firm of

Facts found by the Court.

ship brokers in Philadelphia, were authorized by cable message from the owners in England to get a charter for the *Whickham* to carry grain from the United States on her return voyage. Not being able to do this in Philadelphia, the firm, on the first of August, telegraphed Mr. Erickson, a ship broker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel "had sailed, or was about to sail, from Benizaf with cargo for Philadelphia." The precise form of the authority given by the owners to Gregg & Co. is nowhere shown from the evidence, further than may be inferred from the telegram to Erickson.

(4.) A short time before the first of August, Schumacker & Co., of Baltimore, the original libellants, employed Mr. Ford, another ship broker in that city, to procure them a vessel to take a cargo of grain to Europe which they were under contract to ship in August. He, finding that steamers for that month were scarce, and hearing of the *Whickham*, took Mr. Erickson to the office of Schumacker & Co., and suggested that she might do. At the interview which then took place it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer the purpose. Schumacker & Co., doubting whether the *Whickham* could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival upon the basis of the language in the telegram, and finally Schumacker & Co. agreed to take her; first, however, providing that she might be loaded in Philadelphia or Baltimore at their option, intending, if she did not arrive in time for Baltimore, to get her cargo under their contract at Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about 20 days. This all occurred at Baltimore on the first of August, and it does not appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel

Facts found by the Court.

except as they were to be inferred from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibraltar, which was a day's sail away.

(5.) As soon as the bargain was concluded, Erickson sent to Gregg & Co. for a charter-party in form. They immediately sent the draft of one in which the vessel was described as "sailed from or loading at Benizaf." This Schumacker & Co. declined to accept on the ground that their agreement was for a vessel that "had sailed or was about to sail from Benizaf with cargo for Philadelphia." This being communicated to Gregg & Co. they at once sent forward a new draft to meet the wishes of Schumacker & Co., and using the language they insisted upon. This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit A, and filed with the original libel. From this it appears that in the printed blank which was used there were the following words: "Charterers to have option of cancelling this charter-party should vessel not have arrived at loading port prior to —." These words were erased by drawing a pen through them before signing.

(6.) Schumacker & Co. having ascertained, on the ninth of August, that the steamer passed Gibraltar outwards from Benizaf on that day, and being then satisfied that she would not arrive in time to load either at Baltimore or Philadelphia in August, at once set about securing another vessel, and on the 16th got one, which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Whickham of \$1,988.25. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that if Schumacker & Co. are entitled to recover at all it must be for the increase in the cost of freight which they paid.

(7.) The discharge of the cargo of iron ore from the Whickham was completed with dispatch at Philadelphia,

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and on the seventh of September she sailed for Baltimore, where she arrived on the ninth, and was tendered Schumaker & Co., under the charter, on the eleventh. They declined to accept her for the reason that, as they claimed, when the charter-party was entered into she had neither sailed nor was about to sail from Benizaf, within the meaning of that provision in the charter, as understood by the parties. Another charter was then obtained, but at a loss to her of \$4,098.18, as of May 10, 1880. It is agreed that the charter was as favorable as any that could have been effected, and that if her owners are entitled to recover at all, it must be for the above amount as their loss.

Blackiston & Thomas, for appellants.

A. Sterling, Jr., Esq., for appellees.

WAITE, C. J. The only question in this case is whether, on the first of August, 1879, the *Whickham* was "about to sail from Benizaf with cargo for Philadelphia," within the meaning of that term as used in the charter sued on. The owners in England, having accepted the contract made for them by their agents in Philadelphia and Baltimore, are bound by its terms, just as their agents would be were they principals. The language used must therefore be interpreted, if possible, as the parties in Baltimore understood it when they were contracting.

It is conceded that if the *Whickham* was "about to sail," giving that phrase the effect it was intended to have, Schumacker & Co. took the risk of her arrival in time to answer the purposes; but if she was not, that the warranty to that effect was broken, and her owners must make good the loss caused by the breach.

"About" is a relative term. It may indicate one thing when applied to one state of facts, and another under different circumstances. "Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the prac-

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tical interpretations which they, by their conduct, have given the provisions in controversy." *Lowber v. Bangs*, 2 Wall., 787. The prominent fact in this case is that a vessel was wanted to load at Baltimore in August. This was brought directly to the attention of all the contracting parties, and it was well understood that Schumacker & Co. would not take the *Whickham* unless there was a reasonable probability of her arrival in time. That the charter would not have been made if it had been known that she could not get away from Benizaf until the evening of the 7th is apparent from the fact that, as soon as it was ascertained she did not pass out from Gibraltar until the 9th, steps were taken to get another vessel in her place. In addition to this, the testimony shows that when the parties were making their calculations as to the time she would probably reach Baltimore, it was assumed that she either had sailed, or, at the latest, would sail on the next day, which was the second of August. It was not supposed that her time to Philadelphia would be less than 20 days, and this, with a reasonable allowance for unloading, could not put her in Baltimore earlier than the 28th or 29th, if she sailed as late as the 2d. Her actual time to Philadelphia exceeded the estimate, but this, if her sailing had been prompt, would have been at the risk of the charterers.

Parol evidence is not admissible to vary the terms of a written instrument, but, where ambiguity exists, it may be given in aid of interpretation to show the facts and circumstances in the midst of which the parties were acting. These assumptions and calculations are facts in the light of which this indefinite word is to be read. Since "about" may mean a longer or shorter period, according to circumstances, these circumstances tend to show what limitation the parties put upon it in this transaction.

Another important fact is found in the practical interpretation which the parties have, by their conduct, put on the language they have used. Gregg & Co., in Philadelphia, seem to have assumed that the vessel would be about to sail from Benizaf with cargo, within the meaning of their

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telegraphic authority to Erickson, if she were there loading, and they consequently, in their first draft of the charter-party, described her as "sailed or loading at Benizaf." This, however, did not meet the views of Schumacker & Co., and they declined to enter into the contract on those terms, claiming that they had agreed for a vessel that was "about to sail." In this way they, in effect, said that, according to their understanding of the language upon which they had been acting, a vessel might not be "about to sail" if she was only loading at such a port as Benizaf, and with such a cargo as she was getting there. To this suggestion Gregg & Co. apparently assented without objection, for they immediately sent forward the new charter-party, with their signature affixed, in which the vessel was described in accordance with the language they had used in their telegram to Erickson. Such conduct shows clearly that the word "about" was used advisedly, as indicating some shorter period of time than loading would necessarily imply.

Under these circumstances it seems to me clear that the parties must have understood their language to mean that the *Whickham* had either sailed or was *about ready* to sail with cargo. It is difficult to reconcile any other interpretation with the undisputed facts in reference to which the parties were acting. Taking this as the effect of the contract, I have had no difficulty in reaching the conclusion that the vessel was not in the condition she was represented to be. Her carrying capacity was something over 1,100 tons. Her cargo was iron ore, which could only be put on board in a particular way, and by hand, without the use of machinery. Less than 300 tons were then in, and although the utmost diligence was employed the remainder was not got on board until late in the sixth day afterwards. In short, she was not more than three-elevenths loaded, and the time of finishing was subject to all the contingencies of wind, weather, labor, and boats incident to an open roadstead on the northern coast of Africa. Certainly in this condition she could not be considered as ready to sail. At most she was only loading, with the

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time of her sailing to a great extent uncertain. It is true that the term "about" implies in such a connection the lapse of some time, but not enough, as it seems to me, in this case, to enable the vessel to do what was required of her to put herself in a condition to sail with cargo under her charter from Benizaf to Philadelphia.

It follows that the original libellants are entitled to recover, and that the cross-libel must be dismissed. A decree may be prepared accordingly.

CONCLUSIONS OF LAW.

1. That the Whickham was not about to sail from Benizaf on the first of August, within the meaning of that term as used in the charter-party.

2. That Schumacker & Co. are entitled to recover from the defendants to their libel the sum of \$1,988.25, and the interest thereon from September 11, 1879.

3. That the cross-libel of T. H. Davidson and others must be dismissed.

*United States District Court, for the District of Maryland,
November 8, 1880.*

EHRMAN v. THE SWIFTSURE.

- * 1. Services rendered by two tugs to a steamer hard aground on the Atlantic coast just above Cape Charles, in pulling the steamer off, the weather being good but the locality dangerous, the whole time occupied being three hours, and neither the tugs nor their crews being in any danger, are salvage services.
- 2. In such case, the steamer and cargo being worth \$135,000, the court awarded the sum of \$2,500 as salvage.

MORRIS, D. J. The British steamer, Swiftsure, 1,920 tons, laden with a cargo of iron ore, on a voyage from the coast of Africa to Baltimore, went aground about 9 o'clock

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on the morning of May 9, 1880, in the waters of the Atlantic ocean, about three miles from the light-house on Smith's island, and about 10 miles from the entrance into the Chesapeake bay. The morning was pleasant, with a somewhat hazy atmosphere, and the sea was smooth, but the master of the steamer mistook the light-house on Smith's island for that on Cape Henry, and when his vessel touched the bottom supposed that he was on a bar, and kept her at full speed until he had forced her over a mile toward the shore, and until she rested firmly bedded in the sand. During the forenoon the sea was very smooth and the wind south-west, and the steamer lay solidly in the sand, and those in charge of her appear not to have been specially alarmed at her situation, and to have confidently hoped that she would float off without injury at high tide, which would be between 7 and 8 o'clock in the evening.

The steam-tug R. T. Banks, learning from the pilot-boat that the Swiftsure was aground, went to her about 11 o'clock, but finding the captain of the Swiftsure intoxicated, and the first officer not willing to employ him, the master of the tug concluded to remain by her. The keeper of the life-saving station at Cape Charles learning the steamer's situation, went out to her about 11 o'clock and boarded her. He found the captain intoxicated, and had an understanding with the mate that he should keep a lookout for them during the night, if they should have to remain, and that he should show a light on a favorable landing place on the shore should the steamer burn signals of distress. About midday the two steam-tugs America and Rattler, while cruising just outside of the capes of the Chesapeake bay looking for vessels coming from the sea to be towed in were informed by the pilot-boat that the Swiftsure was aground on Smith's island. They at once proceeded to where she was lying, a distance of eight or ten miles, and they arrived along-side of her about 2 o'clock in the afternoon. These two tugs are among the most powerful on the Atlantic coast, and are well equipped for relieving stranded vessels. They offered assistance and were invited on board of the steamer.

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The wind, which had been south-west in the morning, was now south-east—that is to say, directly from the ocean—and the water, which in the morning had been very smooth, was now much rougher, so that the steamer, as the tide rose, was thumping more and more upon the bottom. Her officers were in consequence fearful that she might receive serious injury if the thumping continued, and when the tugs arrived were making some preparations looking to throwing overboard a portion of her cargo if the thumping should increase and the ship not get off as the tide rose. The officers of the steamer asked the captains of the tugs if they thought they could get the steamer off. They replied that they could, and were willing to try. They were then told that the sooner they got to work the better. The tugs made fast first one and then two hawsers to the stern of the steamer, and by using one tug to keep the other in position, as well as to assist in pulling, and with the aid of the powerful propeller of the steamer herself, they presently got the steamer so that she would move when lifted by the roll of the sea, and little by little they pulled her a mile or more, until she was in water where she would float. They were occupied in this service until about half-past 5 o'clock. When the steamer was fairly afloat, and in deep water, her captain declined further assistance from the tugs, and, obtaining a pilot, came in through the capes and up the bay to Baltimore. She was there examined by marine surveyors, and found not to be in any respect injured in hull or machinery, nor was her cargo damaged.

The value of the steamer was about \$110,000, and her cargo about \$15,000. She was 275 feet long, and had engines of 180 horse power. She was a well-built iron steamer, launched in August, 1878. The value of the two tugs was between \$30,000 and \$40,000.

I think it clearly appears that the steamer, at the time the assistance was offered, was in peril, and that her officers so considered her. The wind and sea were increasing. That part of the coast is considered very dangerous, and liable to sudden storms. The tide there has a rise of four feet,

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and it would have been high tide between 7 and 8 o'clock ; but it appears to me that it was almost a mere chance that the steamer would have been able to get off at high tide by her own power alone. She was not on a bar, but fully a mile in shore, and with shoal water all around her. The wind had a tendency to carry her further in, and the thumping was very likely to cause her to bilge and to put her machinery out of working order. I think there can be no doubt that it would have been culpable hardihood in her master to have refused the assistance offered by the tugs, and to have relied upon the chance of getting off at high water without their aid. The service of the tugs was, therefore, a salvage service, as distinguished from mere towage. It led to the rescue of the ship from danger, and should be remunerated as salvage.

It is to be considered, however, that the tugs, in rendering this service, were not going outside their usual occupation and use. They were both, when they started for the Swiftsure, outside of the capes, looking for employment. One of them had been so far out as to meet the Swiftsure as she was coming in from the sea early in the morning. They encountered no unusual risk either to life or property, and the officers and crew endured no unusual fatigue or labor, and neither men nor vessel met with any injury. There was ample depth of water all around the Swiftsure for the tugs to navigate, and the weather was not stormy nor threatening. So that, although the assistance was most timely and in the highest degree beneficial to the steamer, it was, so far as the tugs were concerned, hardly different from any other three hours of their daily employment. It is scarcely to be doubted that if they had been solicited in the morning to undertake the service for a fixed price they would have agreed to remain, so long as the weather was such as in fact it continued to be along-side the steamer, and work at her for their usual compensation per hour.

Norfolk was only 35 miles off, and in that port there were two wrecking companies, owning powerful steam-vessels,

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kept for the purpose of rendering assistance to disabled and wrecked vessels. Two of these, the *Resolute* and the *Rescue*, started to go to the *Swiftsure*, one of them at 4 o'clock in the afternoon and the other at 11 o'clock at night. So it appears that the *Swiftsure* was not lying where she would be likely to remain long without assistance if she had signalled for it, or had taken means to communicate with the shore. Although, therefore, this is a case of salvage, it is one of a low order of merit, and wanting in those features which chiefly have prompted generous allowance proportioned to the value of the property saved.

It has been held, and I think rightly, with regard to steamers whose regular pursuit is to tow and relieve vessels, and where connected with the service rendered there are no circumstances of unusual danger to life or property, and no unusual activity, enterprise, or heroism displayed in going out to render it, that such service should not be regarded as meriting a reward out of all relation and proportion to what would have been accepted upon a contract contingent upon success. *The Birdie*, 7 Blatchf., 243; *The H. B. Foster*, 1 Abb. Adm., 235.

The allowance in such cases is intended to be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam-vessels sufficiently powerful to make the assistance effective. It would be contrary to the spirit of the maritime law to reduce the salvage compensation below this standard of liberal inducement, and it would equally frustrate its purpose if the allowance should be so large and so out of proportion to the services actually rendered as to cause vessels, in situations in which it was expedient that they should quickly accept assistance of the character rendered in this case, to hesitate or decline to receive it because of its ruinous cost. Endeavoring to keep clear of both the difficulties above indicated, and intending to practically apply the rules of the maritime law and the spirit of the precedents in our own courts of admiralty

Syllabus.

to which my attention has been called, I have concluded in this case to award the salvors the sum of \$2,500.

With regard to the costs, although the claim of \$40,000 made by the libellants was extravagant, and may have operated oppressively upon the respondents, yet, under all the circumstances of this case, and as it is not shown that any tender or offer of any definite sum was ever made to the libellants, I am not inclined to vary the usual rule.

*United States District Court, for the District of Maryland,
January 13, 1881.*

BOULT AND OTHERS v. SHIP NAVAL RESERVE.

- I. The charterers agreed to pay for the vessel a lump sum. They procured, to be put on board by freighters in Liverpool, a cargo of iron ore, at a rate of freight which on the amount of ore put on board, would have exceeded the lump sum which they were to pay. The charter stipulated that the master should give the charterers a draft for the excess of freight between the charter and the bill of lading, the draft to be drawn on the ship's consignee at the port of discharge, payable 10 days after ship's arrival. The charter also contained a stipulation that the charterers were not to be held liable for any loss of freight arising from leakage, breakage, drainage, or any other cause beyond their control. The bill of lading fixed the freight at a certain rate per ton of cargo delivered. On delivery of cargo at Baltimore, there was found to be a considerable loss of weight, and the freight on the actual output was less than the lump sum mentioned in the charter. It appeared that the loss of weight was not attributable to any fault of the ship or owners, and that some loss of weight on such a cargo was always to be expected.
- (1) *Held*, that as the bills of lading called for freight only on the weight delivered, and that as the freight on the actual delivery fell short of the lump sum, there was no excess payable to the charterers.
- (2) *Held*, that the stipulation that charterers were not to be liable for any loss of freight arising from causes beyond their control, was not to be so interpreted as to entitle them to demand a fictitious excess of freight which the bill of lading did not entitle the ship to collect.
- II. The charter-party was executed in Liverpool, between British subjects, and the vessel was a British ship, but the vessel having been attached

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within the district, and it appearing that all the facts necessary to determine the case were sufficiently proved without taking testimony under a foreign commission, *Held*, that justice would be promoted by taking jurisdiction and disposing of the case.

Robert Baldwin, for libellants.

Sebastian Brown, for respondents.

MORRIS, D. J. The owners of the British ship *Naval Reserve*, 1,831 tons, on February 4, 1880, chartered her to the libellants for a voyage from Liverpool, where she then was, to Baltimore, for the lump sum of £1,212 10s.

The charter-party shows that it was contemplated that the libellants, who were ship-brokers of Liverpool, might not load the vessel themselves, but might procure a cargo to be put on board by other freighters, at a rate which would yield them a profit, and that the consignee of the vessel, in that case, was to collect the whole freight, and they were to receive through him the excess. Accordingly, the charter-party contains these stipulations: "The freight [that is the lump sum] to be due and payable, on true delivery of the cargo, in cash, at current rate of exchange for bankers' 60-days' sight bills on London, on date of vessel's entry at custom-house; captain to give his draft on his consignees, at the port of discharge, in charterer's favor, payable 10 days after ship's arrival, for any excess of freight as per bills of lading and this charter. Any deficiency between freight and charter to be paid here in cash, less three months' interest and cost of insurance thereon. The charterers are not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any other cause beyond their control."

The charterers, who are the libellants, did procure for the ship a full cargo of 1,800 tons of iron ore, known as "purple ore," at the rate of 14s. 8d. per ton on weight delivered. If 1,800 tons had been delivered the freight thereon would have amounted to about £70 in excess of the lump sum, and it is to recover this alleged excess of £70 that this suit

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is instituted. It appears, however, that when the cargo was delivered in Baltimore there was a loss of weight of about 120 tons, so that, instead of an excess, the freight actually received by the ship was some £20 less than the lump sum mentioned in the charter. The ship encountered on the voyage exceedingly rough weather, and was obliged to put back to Crookhaven to repair her rudder, and afterwards was compelled to jettison about 10 tons of the cargo, and to put back to Queenstown to get her pumps cleared, and while there discharged and reshipped a part of the cargo. She finally reached Baltimore, and discharged the cargo during the month of June. The discharging was conducted in the manner usual in the port. The ore was hoisted from the hold and dumped into a shute leading to wheelbarrows, then wheeled to cars standing at some distance and dumped into the cars. When the cars were loaded they were run on to scales and weighed by the custom-house officials. This process of discharging in this climate in the summer season necessarily affords opportunity for the drying of the ore. Purple ore is, when dry, a very fine powder, and when wet forms into lumps about the size of grains of wheat. It takes up moisture very readily, and the difference in weight between its dry and wet condition may amount to 12 per cent. It appears from the proof that there is always some loss of weight on a cargo brought from Great Britain and discharged at Baltimore. By merchants in the trade 5 per cent. is estimated to be the average loss. On 25 cargoes received by one merchant the evidence shows that there was a loss on every cargo, varying from $\frac{1}{2}$ of one per cent. to $7\frac{1}{2}$ per cent. The loss on the cargo of the Naval Reserve was $7\frac{1}{10}$ per cent.

The contention of the libellants is that, as by the terms of the charter-party "the charterers were not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any cause beyond their control," they were to be paid the excess of freight called for by the bills of lading over the lump sum mentioned in the charter, notwithstanding no excess of freight was collected by reason of loss of

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weight in the ore from drainage or evaporation or other loss, and they claim that the true interpretation of the charter entitled them to have a draft in their favor, drawn by the captain, before the vessel sailed from Liverpool; the draft to be for the amount of this excess, drawn on the consignees of the vessel at the port of discharge, payable 10 days after the vessel's arrival. It is to be observed, however, that the charter-party speaks of an excess of freight "as per bill of lading and this charter." The bill of lading states the freight to be 14s. 3d. per ton *on weight delivered*, so that whether or not there was an excess of freight, "as per bill of lading and this charter," could not be ascertained until the cargo was delivered. This being the contract for freight expressed by the bill of lading,—a contract made by the libellants themselves with the freighters,—and it being almost an absolute certainty that there would be, on a cargo of purple ore, some loss of weight, it is scarcely supposable that the owners intended that they were to pay to the charterers a fictitious excess of freight which they could have no expectation of collecting. The more obvious and reasonable meaning of the clause, "charterers not to be held liable for any loss of freight arising from breakage, leakage, drainage, or any other cause beyond their control," in the connection in which it is found in this charter, is, it seems to me, that if there was once put on board cargo sufficient, at the rate fixed by the bills of lading, to satisfy the lump sum, then the charterers were not afterwards to be held liable to the owners for any deficiency which might arise from any cause beyond their control. This interpretation, I think, fully satisfies the language of the stipulation, and is reasonable and sensible, while that contended for by the libellants seems to me strained and unreasonable. Whatever causes there were which united to produce the loss of weight in the cargo, it is clear they were not causes attributable to any fault of the ship or owners; and as the excess of freight intended by the charter must, in my judgment, be held to be an actual excess, which the ship's consignee was entitled to collect from the consignee of the cargo, it follows that

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there is nothing due to the libellants. The claimants have urged the court not to exercise jurisdiction in this case for the reason that the libellants and claimants are all British subjects, the ship British, and the contract one made in Liverpool. If there were any allegations that the language of the charter is to be explained by any usage or custom of the port of Liverpool, or if the facts necessary for the consideration of the case had to be proved by testimony to be taken in that port, there might be reasons for remitting the libellants to the courts of their own country; but as the facts necessary for the determination of the question raised are not disputed, and as the meaning of the contract seems to me perfectly clear and favorable to the party objecting to the jurisdiction, I have considered that in this case justice will be promoted by my exercising the jurisdiction which undoubtedly this court has, and by now disposing of the case. Other questions; as to the form of the libel, have been raised by the claimants, but in the view I have taken of the controversy, on its merits, it is not necessary to pass upon these questions.

Libel dismissed.

*United States District Court, for the District of South
Carolina, February 3, 1881.*

THE GRAF KLOT TRAUTVETTER.

1. Although by the law of Germany the master of a German vessel may have a lien for his wages, yet when the vessel is sold in a port of the United States under an admiralty decree, he cannot assert such a lien, if he has any, against material men in that port with whom he had contracted and to whom he had made himself personally liable.
2. The seamen of a German vessel the voyage of which is broken up at a foreign port are entitled to their wages up to the date of the termination of the contract and also to two and a half months extra wages as passage money to the port from which they shipped.

IN ADMIRALTY. Petition to establish liens.

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SEABROOK, Commissioner. In pursuance of a decretal order in the above-entitled cause on the thirtieth of November, 1880, by which it was referred to the undersigned, one of the commissioners of this court, "to ascertain the respective amounts due to the petitioners and the priorities of their respective liens on said barkentine, and to report the same, with leave to report any special matter," to this court, I, E. M. Seabrook, the commissioner to whom the matter was referred, do report that I was attended by C. Inglesby, Esq., of Messrs. Lord & Inglesby, proctors for the intervening libellants, the petitioners in this cause, and by Isaac Hayne, Esq., of Messrs. Hayne & Ficken, I. P. K. Bryan, Esq., of Messrs. Bryan & Bryan, I. N. Nathans, Esq., and James P. Lesesne, Esq., of Messrs. Lesesne & Lesesne, proctors for the different original libellants against the barkentine Graf Klot Trautvetter, and have taken and examined the testimony offered in support of the claims of the said intervening libellants, and as to the priorities of the same, and beg to submit the following:

It is proper, in the first place, to state that libels were filed against the barkentine Graf Klot Trautvetter in this honorable court on the sixth, eighth, and sixteenth days of November last, and that the claims of said libellants were adjudicated by it, and said vessel sold by its decree of November 20, 1880, to satisfy the same.

The claims of the intervening libellants are reported upon in the order in which they are set forth in their petitions.

1. The claim of H. W. Frundt, master of the barkentine Graf Klot Trautvetter. This claim is as follows:

21 months' and 15 days' wages, as	
master, from 17th Feb., 1879, to	
Dec. 2, 1880, at 120 marks per	
month, - - - -	marks 2,580
5 per cent. commission on £1,498 freight	1,517
Passage money to Antwerp, - -	300

Marks, reduced to U. S. currency, marks 4,397=\$1,054 71

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Claim of H. W. Frundt,	\$1,054 71
Expenses on shore in Charleston while bark was repairing,	150 00
Amount advanced for vessel,	48 00
	<hr/>
	\$1,252 71

This claim of the master is based upon the assumption that the Graf Klot Trautvetter, being a German vessel, the said claim must be decided by German maritime law, and that according to that law the master of a German vessel has a prior lien on the vessel, equally with the seaman, for his wages. The maritime law of the United States, as administered in its courts of admiralty, on the other hand, while it regards the claims of seamen for wages as a sacred lien, and gives them priority over all other claims on the vessel, does not extend this privilege to the claims of a master of a vessel for wages. It gives the master of a vessel no lien on the vessel for his wages, or for advances and disbursements made by him abroad. The decisions in support of this position are to be found quoted at length in *Desty, Ship. & Adm.*, 117, 118.

As this honorable court, as stated in the beginning of report, has decreed that the claims of the original libellants in this case were liens upon the vessel, the issue is raised between the aforesaid claims and that of the master of the aforesaid vessel, and this issue involves the question whether the German maritime law or the maritime law of the United States should govern in the decision of the conflicting claims of the respective libellants.

I hold that the maritime law of the United States must govern, and that the master of said vessel has no lien on the vessel for his wages and advances, as set forth in his petition. In support of this view the following distinguished authority is referred to. Chief Justice Story, in his *Conflict of Laws*, § 823, pp. 394-95, says:

“ But the recognition of the existence and validity of such

liens, by the foreign countries, is not to be confounded with the giving them a superiority, or priority, over all other liens and rights justly acquired in such foreign countries, under their own laws, merely because the former liens in the countries where they first attached had there by law, or by custom, such a superiority or priority. Such a case would present a very different question arising from a conflict of rights, equally well founded, in the respective countries.

"This very distinction was pointed out by Mr. Chief Justice Marshall in delivering the opinion of the court in an important case. His language was: 'The law of the place where the contract is made is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent on the place where the property lies, and where the court sits which is to decide the cause.' And the doctrine was, on that occasion, expressly applied to the case of a contract made in a foreign country with a person resident abroad."

Section 324: "Huberus has also laid down the qualifying doctrine: foreign contracts are to have their full effect here, provided they do not prejudice the rights of our own country, or its citizens."

"Hence," he adds, that "the general rule should be thus far enlarged, if the law of another country is in conflict with that of our own state, in which also a contract is made, conflicting with a contract made elsewhere, we should in such a case rather observe our own law than the foreign law."

Section 326, p. 410: "Lord Ellenborough has laid down a doctrine essentially agreeing with that of Huberus. 'We always import,' says he, 'together with their persons, the existing relation of foreigners, as between themselves, according to the laws of their own countries; except, indeed, where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way; in which case our own is entitled to the preference. This

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having been long settled in principle, and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it further.' The supreme court of Louisiana has adopted a little more modified doctrine, coinciding exactly with that of Huberus, 'that in a conflict of laws it must often be a matter of doubt which should prevail, and that whenever that doubt does exist the court which decides will prefer the law of its own country to that of a stranger; and if the positive laws of a state prohibit particular contracts from having effect according to the rules of the country where they are made, the former must prevail.' "

Section 327, pp. 410, 411: "Mr. Chancellor Kent has laid down the same rule in his Commentaries, as stated by Huberus and Lord Ellenborough, and said: 'But on this subject of conflicting laws it may generally be observed that there is a stubborn principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is that where the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land.' Mr. Burge has expressed his own exposition of the doctrine in the following terms: 'The law of a foreign country is admitted in order that the contract may receive the effect which the parties to it intended. No state, however, is bound to admit a foreign law, even for this purpose, when that law would contravene its own positive laws, institutions, or policy, which prohibit such a contract or *when it would prejudice* the rights of its own subjects.' "

We are not left, however, to rely upon the authority of the distinguished text writer above quoted in the solution of the question at issue, as it has been directly adjudicated in our own courts. In the case of *The Bark Selah*, in the district court of the United States for the district of California, Judge Hoffman rendered the following decision:

"The master of the above bark, which is a British vessel, intervenes for the payment of his wages out of the proceeds concurrently with the seamen, and in preference to the claims of certain material men for supplies furnished in this

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court on the usual credit of the ship-owners and masters. He claims this right under the Statute of 17 & 18 Vict. c. 104, § 191, which provides that every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of which, by this act, or by any law or custom, any seaman not being master has for the recovery of his wages.

"No decision is produced under this act to the effect that the master may assert his claim for wages in priority to those of material men with whom he has contracted and to whom he is personally liable.

"But, even if such be the law of England, it cannot supersede our own laws, which determine the rights of persons within our jurisdiction, and the effects of contracts made under them. As the contract with the material-man was made in this port, its effect, and the remedies under it, must depend upon our law, which is at once the *lex fori* and the *lex loci contractus*.

"By the general maritime law prevailing in the United States and administered by the national courts of admiralty, the claim of the material-man for materials furnished to a foreign vessel carries with it a lien on the vessel and has a priority over the master's claim for wages.

"It was held by Mr. Justice Story that even the states of this Union have no power to alter, enlarge, or narrow, with respect to foreign vessels, the admiralty jurisdiction of the United States, as governed by the legislation of congress, and by the general principles of maritime law. They have no authority to change that law, in respect to such vessels, by denying liens existing under it, by creating new liens not recognized, or alter the priorities among different lien-holders. *The Chusan*, 2 Story, 463.

"If such powers are withheld from the states they surely cannot be conceded to the legislature of a foreign country. By the maritime law which it is the duty of this court to administer, the libellant is entitled to a lien on the vessel, unless it clearly appears that he gave an exclusively personal credit to the master or owners, in exoneration of the vessel. *The Nestor*, 1 Sumn., 73, 75.

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"The proof in this case is insufficient to establish this state of facts. Nor does it appear that an exclusive credit was given to the ship and owners, in exoneration of the master's liability.

"As the claim, therefore, is one to which the maritime law attaches a lien prior to that of the master of any existing under that law, and as the master is himself personally liable for the debt, his claim must be postponed to that of the libellant. 4 Sawy., 40, 41."

But even if it should be admitted that the German law is the law of this case, I hold that the claim of the master cannot be maintained. The evidence before me shows that the master, when obtaining the credit which he did from the material men, represented himself absolutely as part owner of the vessel, and rendered himself liable for said indebtedness, and he is estopped from setting up a claim which, if allowed, would, *pro tanto*, defeat the claim of the said material men.

2. Claim of Carl Saatman, mate, shipped at Liverpool, September 5, 1879, discharged December 2, 1880, at Charleston, South Carolina.

This claim is as follows, to wit:

14 months' and 27 days' wages, at	
78 marks per month from the 5th	
Sept. 1879, to Dec. 2, 1880, -	marks 1,162
2½ months' wages, to pay passage home,	195
	<hr/>
	marks 1,357
Less amount paid him by captain -	239
	<hr/>
	marks 1,118 = \$268 11

In considering this claim, the first question raised is as to the item of 195 marks, for 2½ months' wages, to pay passage home, the solution of which depends upon the German law. So far as I have been able to learn, the German law applicable to the point in issue, from the

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translations of the same put in evidence, is as follows, to wit:

“When the contract for wages is terminated before the completion of the voyage, without any fault of the crew, (as in this case, by the sale of the vessel under process of law,) and the crew are discharged, they are entitled to the wages earned up to the date of the termination of the contract, and in addition to a free passage to the port from which they shipped, and to the wages which they would have earned during said passage, or to a corresponding remuneration, according to the option of the captain,—the return passage, and wages together, to be computed at from two and one half to four months’ wages, according as the crew is discharged in a European or foreign port; but they are not entitled to more than they would have earned on the completion of the voyage.”

It further provides that the claim to a return passage and wages is satisfied if the seaman is capable of work and gets service on a German ship, corresponding to his former position and wages, and the ship is bound to the port from which he shipped, or to some port lying near the same. In this latter case free passage and wages are allowed from the port to which he is bound to the port from which he shipped.

The German law upon this point is similar to the English and American laws, and is for the protection of seamen. It is intended, where there is a breach of contract for wages without fault of the seaman, to secure to him indemnity; or, in other words, to place him in as good a position as he would have been in had the contract been performed. In this case no port for the termination of the voyage was fixed in the shipping articles; the contract was for certain ports and further on.

The evidence shows that the Trautvetter was purchased by a German, a resident of Barth, Germany, and that on the seventh of December she was engaged under a charter-party “for a voyage from Charleston, South Carolina, direct to a safe port in the United Kingdom or on the continent—

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Havre to Hamburg, both included, or so near thereto as she can safely get—on terms following; port of discharge to be named on signing bills of lading," and that Carl Saatman shipped on said vessel as mate. The evidence does not show at what wages he shipped, but, in the absence of proof to the contrary, the inference is that the wages for which he shipped under the charter-party were equal to those he had been receiving, and that he would be placed, at the termination of the voyage, in as good a position as if the original contract had not been terminated. I report the following amount to be due him :

15 months' and 8 days' wages, at	
78 marks per month, from Sept.	
5, 1879, to Dec. 8, 1880	marks 1,178
Less amount paid by the captain -	289
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	marks 989 = \$225 36

It was contended that the amount of 78 marks, the advance stipulated in the shipping articles to be paid to the mate, should be deducted from his claim. I hold that it was competent to prove by parol testimony that said advance was not paid, and that the evidence adduced proves its non-payment.

Claim of John Schacht, carpenter. Shipped February 28, 1879, at Antwerp; discharged November 9, 1880, at Charleston, South Carolina. This claim is as follows:

20 months' and 12 days' wages, at	
54 marks per month, from 28th	
Feb. 1879, to 9th Nov. 1880,	marks 1,099 93
2½ months' wages, to pay passage home	185 00
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	marks 1,284 93
Less amount paid him by captain,	197 46
	<hr/>
	marks 1.087 47 = \$248 79

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Claim of August Lass, seaman. Shipped at Antwerp on twenty-eighth of February, 1879; discharged at Charleston, South Carolina, November 9, 1880. This claim is as follows:

16 months' wages, at 36 marks,	
from 28th Feb. 1879, to June	
20, 1880, - - - -	marks 576 00
4 months and 12 days as steward,	
at 48 marks, from 28th June to	
9th Nov., 1880, - - - -	211 20
	<hr/>
	marks 787 20
2½ months' wages to pay passage home	120 00
	<hr/>
	marks 907 20
Less amount paid him by captain, -	470 29
	<hr/>
	marks 436 91 = \$104 78

Claim of William Muller, seaman. Shipped at Antwerp the 28th February, A. D. 1879; discharged at Charleston, South Carolina, November 9, 1880. This claim is as follows:

16 months' wages, at 33 marks per	
month, from 28th Feb., 1879, to	
Nov. 9, 1880, - - - -	marks 528 00
4 months and 12 days, at 36 marks	
per month, from 28th June to	
Nov. 9, 1880, - - - -	158 40
2½ months' wages to pay passage	
home - - - - -	90 00
	<hr/>
	marks 776 40
Less amount paid him by captain,	311 97
	<hr/>
	marks 464 43 = \$111 37

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Claim of John Saatman, seaman. Shipped at Glasgow 17th February, 1878; discharged at Charleston 9th November, 1880. This claim is as follows :

12 months' wages, at 25.50 marks,	
from 17th Feb., 1878, to 17th	
Feb., 1879, - - -	marks 360 00
16 months' wages, at 23 marks,	
from 17th Feb., 1879, to 17th	
January 1880, - - -	368 00
4 months' and 25 days' wages, at	
38 marks, from 17th June, 1880,	
to Nov. 9, 1880. - - -	159 50
2½ months' wages to pay home passage	82 50
	<hr/>
	marks 970 00
Less amount paid him by captain,	412 96
	<hr/>

marks 557 14 = \$183 61

The aforesaid libellants are represented by Capt. Frundt, under a power of attorney. The power of attorney authorizes Capt. Frundt to demand and sue for the wages and compensation due the said libellants for services rendered by them as seamen on board the barkentine Trautvetter, and purports to have been signed on the twenty-sixth of November, 1880, by the said seamen, in presence of P. Belt, chief officer of the ship Neptune, aboard which ship they had sailed. As P. Belt, the witness to the signatures of the said seamen, sailed with them on the day of the execution of the said power of attorney, it was attempted to prove the same by the testimony of Capt. Frundt. Capt. Frundt testified that he saw the said seamen sign the power of attorney on the morning of the twenty-sixth of November, 1880, in the presence of P. Belt, chief officer of the ship Neptune, in the cabin of the said vessel.

It was contended that the signatures to the power of attorney were not genuine, but were written by the same party, and that the power of attorney was illegal.

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Witnesses who had much experience in deciphering handwriting were called upon to test as to the genuineness of the signatures.

Messrs. E. H. Sparkman and William Thayer testified that in their opinion the signatures to the power of attorney were by the same party, and did not correspond with the signatures to the shipping articles.

Messrs. E. A. Pringle, M. W. Wilson, and J. E. Philips, on the other hand, testified that in their opinion the signatures to the power of attorney were by different parties, and corresponded to the shipping articles.

W. M. Oglivie, a clerk of Capt. Card, testified that he was acquainted with the signature of P. Belt, and that in his opinion the signature to the power of attorney as witness was P. Belt's, although he would not swear to it.

The testimony further shows that the power of attorney in question was prepared by Messrs. Lord & Inglesby, the attorneys of the intervening libellants, upon discovery that the ship Neptune, aboard which the aforesaid seamen had shipped, had not crossed the bar and was still in port; that it was arranged that Mr. Inglesby, of said firm, should accompany Capt. Frundt to the Neptune the next day (which was Sunday) and witness the execution of the power of attorney; that in execution of such arrangement Mr. Inglesby met Capt. Frundt at 10 o'clock A. M., the hour appointed, at Southern wharf, and was prevented from going to the Neptune by a heavy fog; that Mr. Inglesby was unable to go the next day, (Monday,) being compelled to go to Columbia that night, and gave the power of attorney to Capt. Frundt to take to the Neptune and obtain the signatures of the seamen to the same; that the power of attorney was returned to Mr. Inglesby the same day by Capt. Frundt, executed as offered in evidence.

The evidence further shows that the shipping articles of the barkentine Trautvetter were delivered to Mr. Witte, the German consul, on the third day of September, the day after the arrival of the said vessel in the port of Charleston and remained in his possession until produced in evidence in this cause.

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From the evidence before me, I report that the signatures to the power of attorney are genuine.

The evidence further shows that the said seamen voluntarily shipped on the 9th of November, 1880, on board of the ship Neptune, for Bremen, a port nearer to Barth, their home port, then Antwerp, the port from which they originally shipped. It does not show, however, the wages at which they shipped. In the absence of proof to the contrary, the presumption is that the wages they shipped at aboard the Neptune were at least equal to those for which they had contracted aboard the Trautvetter. I report that the said seamen are not entitled to return passage home and wages, as stated in the claim in their petition. Objections were made to the increase of wages set forth in the claims of August Lass, William Muller, and John Saatman, on the ground that provision for the same did not appear in the shipping articles.

The evidence shows that August Lass shipped aboard of the Trautvetter as a seaman, and was promoted to the position of steward on the twenty-eighth of June, 1880, at New York, to fill the position of the steward who then left the vessel, and that the increase of wages allowed him corresponded with those given to his predecessor. I hold that the said seaman, August Lass, is entitled to the increase of wages allowed him, as stated in his claim: "If a seaman is promoted he takes the wages of his new office." 2 Parsons Ship. & Adm., 48; *The Providence*, 1 Hagg. Adm., 391; *The Gondolier*, 3 Hagg. Adm., 190; *Hicks v. Walker*, Exch., 1856, p. 57, (Eng. L. & Eq., 442;) *The Schooner Wm. Martin*, 1 Sprague, 564.

I hold, also, that the captain had a right to increase the wages of the seamen William Muller and John Saatman, and that it is competent to prove the same by parol and documentary testimony, and that the evidence adduced proves the increase of wages, as stated in their claims.

I report that the following amounts are due the said seamen:

 Report of Commissioner.

TO JOHN SCHACHT, CARPENTER.

20 months' and 12 days' wages, at
 54 marks per month, from Feb.
 28, 1879, to Nov. 9, 1880, marks 1,099 93
 Less amount paid him by captain, 197 46

 marks 902 47 = \$216 59

TO AUGUST LASS, SEAMAN.

16 months' wages, at 36 marks,
 from 28th Feb., 1879, to June 28,
 1880, as seaman, - - marks 576 00
 4 months and 12 days as steward
 at 48 marks per month, from
 28th June, to Nov. 9, 1880, 211 20

 marks 787 20
 Less amount paid him by captain, 470 29

 marks 316 91 = \$76 06

TO WILLIAM MULLER, SEAMAN.

16 months' wages, at 33 marks per
 month, from 28th Feb., 1879, to
 Nov. 9, 1880. - - - marks 528 00
 4 months and 12 days, at 36 marks
 per month, from June 28, 1880,
 to Nov. 9, 1880, - - - 158 00

 marks 686 00
 Less amount paid him by captain 311 97

 marks 375 03 = \$90 03

TO JOHN SAATMAN, SEAMAN.

12 months' wages, at 25.50 marks,
 from 17th Feb., 1878, to 17th
 Feb., 1879, - - - marks 360 00

Report of Commissioner.

<i>Amount brought forward</i>	marks 860 00
16 months' and 25 days' wages, at 83 marks, from 17th Feb., 1879, to 17th June, 1880, - - -	368 09
4 months' and 25 days, at 83 marks, from 17th June, 1880, to 9th Nov., 1880. - - - -	159 50
	<u>marks 887 50</u>
Less amount paid him by captain,	412 86
	<u>marks 474 64 = \$118 91</u>

Claim of Maximus Lundquist, (Swede,) seaman. Shipped at New York 28th June, 1880; discharged at Charleston, December 2, 1880. Claim is as follows:

5 months' and 4 days' wages, at \$12 per month, from 28th June, 1880, to Dec. 2, 1880, -	\$61 60
2½ months' wages, to pay passage home - -	30 00
	<u>\$91 60</u>
Less amount paid him by captain, - - -	25 00
	<u>\$66 60</u>

I report that the evidence shows that the above seaman contracted at \$10 per month wages, instead of \$12, as stated in above claim. There being no evidence before me showing that the said seaman contracted for a return to New York, I report that he is entitled to a return passage to New York, and wages which he would have earned during said passage, according to the rate of wages contracted for aboard of the Trautvetter. I report the amount due said seaman to be—

5 months' and 14 days' wages, at \$10 per month, from 28th June, 1880, to 12th Dec., 1880, -	\$54 66
Return passage money to New York, - -	10 00
	<u>\$64 66</u>
Less amount paid him by captain, - - -	25 00
	<u>\$39 66</u>

 Report of Commissioner.

Claim of Hans Larsen, (Swede,) seaman. Shipped at New York the twenty-eighth of June, 1880, discharged December 2, 1880. Claim is as follows:

5 months' and 4 day's wages, at \$15 per month,	
from 28th June, 1880, to Dec. 2, 1880, -	\$77 00
2½ months' wages to go home, - - - -	37 50
	<hr/>
	\$114 50
Less amount paid him by captain,	36 00
	<hr/>
	\$78 50

I report the amount due said seaman to be—	
5 months' and 14 days' wages, at \$15 per month,	
from June 28, 1880, to Dec. 12, 1880, -	\$82 00
Passage money to New York, - - - -	10 00
	<hr/>
	\$92 00
Less amount paid him by captain,	36 00
	<hr/>
	\$56 00

In estimating the aforesaid claims 10 days are allowed for the voyage of a sailing vessel from Charleston to New York, and \$10 for the passage of a sailor.

I report that the claims of the aforesaid seamen, Carl Saatman, John Schacht, August Lass, John Saatman, William Muller, Maximus Lundquist, and Hans Larsen, are liens upon the said barkentine Graf Klot Trautvetter, and are of the same rank as to priority. I report, further, that the said liens are prior to the claims of the material-men, which were adjudged liens on said vessel by a decree of this honorable court, of date the twentieth of November, 1880, as stated in the first portion of this report.

The evidence taken before me in this case is filed with this report, and is marked as follows, to-wit:

Testimony of witnesses, Capt. F. W. Frundt, Carl Saatman, Hans Larsen, Maximus Lundquist, C. O. Witte, E. A. Pringle, M. W. Wilson, J. E. Philips, and W. M. Oglivie,

 Opinion.

marked Exhibit A. Power of attorney by seamen to Capt. Frundt, Exhibit B. Copy of accounts of receipts and expenditures of barkentine Trautvetter, Exhibit C. Copy of seamen's accounts, Exhibit D. Copy of ship's certificate, Exhibit E. Charter-party at Montevideo, Exhibit F. Charter-party at Charleston, S. C., Exhibit G. Translation of German law, Exhibits H, 1 and 2, and I. Lithographs of signatures to the shipping articles of the Trautvetter, Exhibit J.

(This report was subsequently confirmed by the district court.)

*United States District Court, for the District of Maryland,
February 4, 1881.*

HAMILTON, ETC. v. BARK KATE IRVING.

Where iron straps and chemical bleaching-powders and soda were stowed near together, and near to cotton, in a ship, so as to injure the cotton ties, and stain some of the cotton, in a rough voyage :

1. *Held*, that the destructive effect to cotton ties of contact with bleaching powders being well known, it was not proper stowage to place them so near together without adequate precaution against injury.
2. *Held*, under the circumstances of this case, that the market value of the damaged cotton ties was to be determined by the price they actually produced when sold, and not by the testimony of experts.

IN ADMIRALTY. Damage to Cargo.

Wm. T. Brantley and A. Sterling, Jr. for libellants.

Sebastian Brown, for respondents.

MORRIS, D. J. There were shipped at Liverpool on board the bark Kate Irving 4,076 bundles of hoop iron, known as "cotton ties," to be delivered to the libellants at Baltimore. The ship took a general cargo, a large part of which consisted of bleaching powders and soda ash in casks.

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The hoop iron was delivered in Baltimore in a damaged condition, and it is for this damage that the libellants seek to recover. The bark had two decks, the lower one having open beams. This open-beam deck was covered in part by plates of iron, which formed part of the cargo, and on these were placed the hoop iron and the chemicals. In the forward part of the vessel was stowed part of the hoop iron; then came a space, of not over three feet, filled with dunnage; then came the chemicals, extending to abaft the main hatch; then there was another space, of from three to four feet, filled with dunnage; and aft of that the balance of the hoop iron was stowed. The vessel was not full. There was but one tier of casks on the between-deck, about four feet high, and the hoop iron was in small bundles, piled up about two feet high, and extended across the ship from side to side. The hoop iron used for cotton ties, such as these were, is in thin, narrow strips, painted black, but not put up in boxes or covered.

The vessel had a very rough voyage, and some of the casks of chemicals were more or less broken and their contents scattered; and, upon delivery, a large part of the cotton ties were found to be damaged, by being corroded by particles of the bleaching powder which had come in contact with them.

The proof shows that the casks of chemicals were well and securely stowed and dunnaged, and that they were no more injured than might easily result from a rough voyage with the best possible stowage; but the libellants claim that the cotton ties were improperly stowed with reference to the chemicals, and particularly with reference to the bleaching powders, in that they were placed on the same deck with a space of not more than three feet between them.

Bleaching powder (chloride of lime) is well known to be a destructive chemical, which quickly corrodes iron when it comes in contact with it. It is shipped in lightly made casks, each containing about a ton in weight, and, on a rough voyage across the Atlantic, it is a common occurrence for heads of the casks to be broken, and even when the

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casks are not broken the contents will sift out between the staves from the working of the casks one against the other; as one of the witnesses said, "the beating of the casks together raises a dust and scatters it about." With so large a quantity of these chemicals filling all the middle of the ship, and with so much vacant space over them, between them and the main deck in which the particles could be wafted about, I am constrained to think that it was not proper to have put the cotton ties within three feet of the chemicals, so near that if any of this injurious substance sifted out it was almost certain to fall upon and greatly injure the iron. The dunnage between the cotton ties and the casks did nothing more than prevent them from shifting and was of but little use to prevent the particles of the chemicals from falling on the ties if they got free. There was no bulkhead or covering of any sort.

That the bleaching powder did get on the iron and did seriously corrode a large part of it is fully proved. The white substance was found on the corroded iron, and the chemical analysis of it proved conclusively what it was. The corrosive and destructive effect of the bleaching powder was well known, and also the peculiar liability of the hoop iron to be injured by it, but no precautions were taken at all adequate to guard against the danger. It is admitted that bleaching powder is commonly carried as part of a general cargo from Liverpool to Baltimore, but no evidence was produced to show that it was customary, or that experience had proved it to be safe, to carry hoop iron stowed in such close proximity to it. On the contrary, such testimony as has been produced in this case on that subject tended to show the contrary.

The libellants' case is, it seems to me, a stronger one than *Mainwaring v. Bark Carrie Delap*, 1 Fed. Rep., 874, in which Judge Choate, upon the facts proved before him, held the ship liable for injury to empty grain bags caused by the fumes of bleaching powders carried as part of a general cargo.

There was in the bill of lading for the cotton ties an ex-

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ception by which the ship was not to be accountable for damage from perils of the sea or from rust; but, as I have already indicated, the libellants have, in my judgment, sustained the burden of showing that the damage was not ordinary rust, but was a corroding caused by contact with a destructive chemical, and resulted from the negligence of the carrier, and that without that negligence the rough weather would not have caused the injury. No water touched the ties, and their position was not shifted. The injury resulted solely from the bleaching powder getting on to them. *Richards v. Hansen (The Svend)* 1 Fed. Rep., 54.

With regard to the amount of damage, I have had some difficulty. There was produced for the libellants the testimony of several merchants dealing in iron, whose evidence went to show that the market value of about one-half of the cotton ties was diminished 50 per cent. by the damage they had sustained. The custom-house officials, in appraising the goods for duties, estimated that one-half had been damaged to the extent of 40 per cent., and allowed that rebate from the invoice price in collecting the duties. It appears, however, that the libellants had intended to sell this importation through their commission merchants, and did sell through them, and that after cleaning and repainting some of the hoops, and by making some extra exertion and selling them in smaller lots, the commission merchant succeeded in disposing of them at prices not very much below the full market price for perfect merchantable goods.

Undoubtedly, the proper measure of damage in such cases is the difference between the market value of sound and the market value of the unsound goods at the time of delivery. It is, however, often difficult to arrive at the market value of unsound goods. It may be that damaged goods of the particular kind are not often dealt in. It is often difficult to find merchants who will buy unmerchantable goods at any price, although to the consumer they may be as serviceable as before they were damaged. In this case one of the principal iron merchants, called as a witness, said he would not

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have taken the damaged cotton ties at any price. I am satisfied, therefore, that it will be much safer to take as the market price of these damaged goods the price they actually produced when sold, there being no proof of any change in the market.

I think the libellants should recover the difference between the amount they have received from sale of the goods and the amount they would have received if the goods had not been damaged, together with the charges for putting them in a salable condition ; less the freight due the ship.

*United States District Court, Eastern District of Virginia,
March 4, 1881.*

THE PACIFIC.

- * 1. Materials or machinery furnished or work done in the original construction of a ship or vessel, are not maritime in their nature, and do not give rise to a maritime contract.
- 2. Nor can they be made so by a state statute, the only effect of such a statute being to attach a lien to a contract originally maritime in its nature, and not to make a contract maritime which is not so originally.
- 3. Hence, a libel *in rem* on a contract of such a character *dismissed*.

IN ADMIRALTY.

In February, 1880, Pardessus & Anthony, who were then residents of New York city, commenced the building of a steam-dredge at Astoria, in New York harbor. Her hull and flooring were completed there, and in the end of April the hull was launched and was towed to Greenpoint, in Kings county, New York, a place near Brooklyn. The timbers used in the construction of the hull were furnished by J. W. Russell, of New York city, and were delivered in New York previous to March 26, 1880. On January 24, 1881, there was still due for the timber on account the sum of \$451.21. Part of the lumber used either in the construction of the hull, or afterwards in the completion of the vessel, was towed to the dredge by V. Vierow. All the timbers so

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towed were used in the construction of the dredge, a part after her arrival in Norfolk. The above towing was done between February 21, 1880, and September 24, 1880. On January 24, 1881, there was still due on this account the sum of \$159. Whilst being constructed, a number of hands were employed about the dredge to assist in setting the machinery and to do any work that was convenient. Edward Davis and James Richardson, of New York, furnished provisions and supplies for these hands. The items in the bill of Davis ran from March 5, 1880, to September 15, 1880, and aggregated \$261.77. The items of Richardson ran between the same dates, and aggregated \$312.48. After the arrival of the hull at Greenpoint, Long Island, C. H. Tiebout, of Brooklyn, furnished nails, bolts and iron, which were used in the construction of the parts of the dredge then remaining unfinished. His bill for the same ran between April 6, 1880, and September 20, 1880, and aggregated \$167.08. There was also a bill of Hunter, Keller & Co., of New York, for materials furnished between August 3, 1880, and September 17, 1880, amounting to \$68.54. The engines and various attachments to the boiler and engines were furnished by John J. Hayes, of Brooklyn. The articles so furnished by him were all the first of the kind, and were part of her original construction. The work of this co-libellant was furnished between March 20, 1880, and June 17, 1880, with the exception of an item of \$6, furnished November 5, 1880, after the dredge was sent to Norfolk. The balance due on this claim was \$1,857.76. The boiler for the dredge, and various work accessory thereto, was furnished by Gustavus Pierrez, of New York. This work was also the first of its kind put upon the dredge, and was a necessary part of her equipment as a dredge. The boiler was furnished under a written contract providing that the title should not pass until the notes given for the purchase money were paid. These notes all fell due after the boiler was delivered. The boiler was delivered about August 10, 1880. The other items ran between May 26, 1880, and September 4, 1880. This work was all done while the

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dredge was in New York. The balance due to Pierrez was \$964.49.

The anchors, ropes, and chains were furnished by H. B. Bailey & Co., of New York city, and were all the first of the kind furnished for this dredge. They were furnished between September 8 and 18, 1880, while the dredge was still at New York, and the amount charged for them was \$787.45.

John F. Walsh, of New York, also did work and furnished materials in caulking the hull, while in New York, for which there was due him \$176. The bucket or scoop of the dredge was furnished by Theo. Smith & Bro., of Jersey City. Various other work was also done by them, which was between the dates of June 30, 1880, and August 7, 1880. The bucket was delivered about September 20, 1880, at Jersey City. This bucket and materials were not sent by them to the dredge, but delivered at Jersey City to Pardessus & Anthony. At the time of delivery the dredge was in New York. The contract was that the bucket was to be delivered in Jersey City. The bucket was not attached to the dredge in New York, but was brought to Norfolk by common carriers. While incomplete as a dredge in this and other respects, but at the same time sufficiently complete to risk the voyage, the dredge was towed to Norfolk, Virginia. After arriving at Norfolk this same bucket, which was the first the dredge had, and was necessary to her completion as a dredge, was attached to the dredge for the first time, as also the poles used in hoisting and lowering it. Various other work, occupying in all 10 days, was done upon the dredge after arriving at Norfolk, before it was complete as a dredge and ready for work. It had left New York September 24, 1880, arrived in Norfolk September 29, 1880, and did its first work October 6, 1880. On account of its incomplete construction it worked poorly, and ran its owners heavily into debt. On December 12, 1880, it was libelled for towage, and a decree of sale obtained. Pending the sale under this decree, its owners, on January 8, 1881, sold the dredge to the National Dredging Company, of Washing-

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ton, D. C., the consideration being \$6,000 in cash, and the assumption by the said company of a dredging contract with the United States government held by Pardessus & Anthony. The purchase money, except a few hundred dollars, was applied by the vendees to the payment of admiralty claims against the dredge held in Norfolk; Pardessus & Anthony assuring the vendees that there were no other admiralty liens on the dredge than those held in Norfolk, and that all other debts were mere personal obligations, of which part were for the construction and fitting out of said dredge. Immediately on the consummation of the sale, the vendee set to work improving and completing the dredge, and on the twenty-fourth of January, 1881, when the present libel was filed, had spent or contracted to spend \$4,000 on it in improvements, which was swelled to \$7,000 by March 1, 1881. None of the above-named parties filed in New York the specifications of lien required by the New York vessel law. It was in evidence that the usual mode of building dredges or steamers of any kind is to build the hull, and to place the engines, boilers, and machinery in the hull after its launching, thereby saving the additional weight of the machinery in the process of launching. The value of the dredge at the date of the hearing (March 3) was estimated at \$12,000 to \$15,000. To build a new one like it would cost about \$18,000. On January 24, 1881, the dredge was libelled by Theo. Smith & Bro., and the various other parties named above came in as co-libellants and petitioners. The National Dredging Company appeared as claimant and intervenor.

Harmanson & Heath, John C. Baker, and Walke & Old,
for the several libellants and co-libellants.

Sharp & Hughes, for the claimants.

(1) Supplies furnished and work done for, in, or about the original construction of ships or vessels are not maritime contracts and not enforced by admiralty courts. 20

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How., 393; 22 How., 129; 23 How., 494; 1 Cliff., 46; 1 Woods, 290; 2 Hughes, 81.

(2) Not being admiralty contracts, they cannot be made so by state statutes. Such statutes cannot enlarge the admiralty jurisdiction. They cannot change into an admiralty contract what the law maritime declares not to be such. The mere allegation that credit was given to the vessel does not give rise to a maritime contract. The subject-matter of the contract must be maritime. If that is the case, then the party will be presumed to have given credit to the vessel, and this presumption will add to his remedy the action *in rem*. The effect of a state statute is therefore merely to add to the remedy *in personam*, which attaches to all maritime contracts, the additional remedy *in rem*. This is a mere alteration of the means of enforcing an admiralty contract. It is not an addition to the subjects of admiralty jurisdiction. If the subject-matter of the contract is not maritime, it cannot be made so by a state statute. The following extracts from decisions prove this.

"The alteration [of the twelfth rule] applies to the character of process to be used, not the jurisdiction. * * * The states can neither enlarge nor limit the admiralty jurisdiction of the federal courts." 3 Biss., 344, 349, (1872.)

The effect of a state law is merely "to attach a lien to a maritime contract." 5 Ben., 71.

"We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contracts, to be enforced by the state courts." 21 How., 251.

"The law of the state begins where the maritime law ends," (*i. e.* the power of a state court to enforce it.) 1 Low., 377.

"It is very obvious that state legislatures have no power to confer any additional jurisdiction upon the United States courts, and it is only where the lien given by the state statute is in respect to a subject which is maritime in its nature that admiralty process will lie to enforce it." 2 Parsons, Ship. & Adm., 324.

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"There is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process. And the alteration in the rules applies altogether to the character of the process to be used in certain cases, and has no relation to the question of jurisdiction." 1 Black, 526. See, also, pages 529-30 of the same case, where it is stated that the lien given by local law must attach to a maritime contract, and that state laws would be enforced only "where it did not involve controversies beyond the limits of admiralty jurisdiction."

"An act of assembly cannot enlarge or regulate the jurisdiction of the admiralty by its own provisions. * * * A lien given by a state may be enforced by a suit *in rem* in the admiralty, but it must be such a suit as the admiralty can entertain; in other words, where the contract or service are maritime, although they are not such as would authorize a proceeding *in rem* in the admiralty, because there was no lien for them; yet when the state law supplies this deficiency and gives this lien, the court of admiralty will enforce it. This is not enlarging the jurisdiction of the court, but the remedy of the party. It does not authorize a suit in the admiralty on the subject-matter, not of admiralty jurisdiction, but only gives a particular remedy for the recovery of the debt." Crabbe, 431-3. "A state statute conferring a lien not maritime cannot confer jurisdiction on the United States courts." 22 How., 129, 132. "A court of admiralty has no jurisdiction of a suit *in rem* against a ship to recover for work, etc., done in building a ship, even though the state law gives a lien therefor." 3 Ben., 163. See, to same effect, 11 Blatchf., 451; 14 Blatchf., 24; 2 Hughes, 48, 49, 52, 54; 43 N. Y., 554, 563. "The admiralty jurisdiction *in personam* does not depend upon the question of lien." 39 N. Y., 27, and cases cited.

(8) If any state law at all applies it is the law of the place where the supplies were delivered, and not the law of the place where the furnisher resides, nor the law of the forum. Of course the *lex loci* governs. The law of Virginia, therefore, has nothing whatever to do with the case. 2 Parsons, Ship. & Adm., 326.

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(4) The parties must therefore rest their case, if they have any, on the law of New York. The part of the law giving the lien may be found in 39 N. Y., 21. That law has been construed to be valid, in so far as it confers jurisdiction upon state courts for the enforcement of liens contracted in the building of vessels, for the very reason that such building is not a maritime contract. There can be no doubt of its validity in so far as it confers jurisdiction on its state courts for the enforcement of liens not maritime but common law. To that extent state laws are, of course, valid, as they do not interfere with the admiralty. All cases that may be cited in opposition to the ground taken above will be found on examination to resolve themselves into this and nothing more. 43 N. Y., 52, 56-7, 554-563.

(5) Even if any of these supplies were of a maritime nature, and the state law could give them a remedy *in rem*, they have no lien under the New York law. That law requires that, in order to preserve the lien, specifications must be filed within 12 days after the departure of the vessel from the port where the supplies were furnished. 61 N. Y., 532-3. In order to avail themselves of the law they must, of course, bring themselves within its provisions. These laws are in derogation of the general law, and must be strictly construed and strictly complied with. *The Lottawanna*, 21 Wall., 558. Not one of the petitioners filed specifications in this case.

(6) A payment on account goes to extinguish that part of the account for which there is a lien. 1 Sprague, 206; 2 Parsons, Ship. & Adm., 153.

(7) Giving credit for a longer time than the lien lasts is a waiver of it. 7 Pet., 324, 344; 2 Parsons, Ship. & Adm., 152.

HUGHES, D. J. This is not an action brought upon an ordinary contract by non-residents against a resident in a United States court on its law or equity side. It is a proceeding *in rem* in admiralty, brought in the United States district court as a court of admiralty. Such a proceeding

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will only lie upon a contract which is maritime. If the claims preferred in this proceeding be maritime, the court has jurisdiction. If they are not maritime, the proceeding is *coram non jndice*, and will have to be dismissed. The owners, defendants, contend that the several claims represented by the respective libellants and petitioners here were for the original construction of the dredge Pacific; that such claims are not enforceable in admiralty; and that the court cannot entertain or enforce them in this proceeding, however meritorious in their nature, and however valid in equity and good conscience against the original owners of the dredge, Pardessus & Anthony, who procured the materials to be furnished and the work to be done which constitute the basis of these claims. The propositions of law relied upon by the owners or claimants are correct.

In *People's Ferry Co. v. Beers*, 20 How., 393, the United States supreme court, which gives us the admiralty law, decided, against the then generally prevalent opinion of the district judges, that a contract to build and complete a vessel is not within the admiralty jurisdiction of the United States courts, though the intention should be to employ the vessel in navigating the ocean; and that such material-man or builder, if he has a lien at all, has only the common-law possessory lien, or such statutory lien as local legislation may have created; neither of which, of itself, confers the admiralty jurisdiction. It held that this admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, touching rights and duties appertaining to commerce and navigation. It said:

"It would be a strange doctrine to hold a ship bound in a case where the owner made a contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship."

It declared that the wages of shipwrights have no reference to a voyage to be performed. The court noticed the fact that district courts had recognized the lien of builders

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and furnishers of material when the local law gave a lien upon the vessel where it was built; but it said that no such case had been sanctioned by the supreme court. Under this decision a contract, in order to be enforceable in admiralty at all, must be maritime. If it be not maritime no state law can help the jurisdiction of the court, and contracts for building and furnishing material to a vessel in the original construction of it are not maritime contracts.

In the case of *Roach v. Chapman*, 22 How., 129, where the steamer under libel was built in Louisville, Kentucky, and the persons who furnished the boilers and engines libelled in admiralty in Louisiana, the court held that there was no jurisdiction. It so held on the express ground that "a contract for building a ship or supplying engines, timber, or other materials for her construction is clearly not a maritime contract."

In that case it was insisted, for the libellants, that the local law of Kentucky, by giving a lien, supplied the defect of jurisdiction arising from the non-maritime character of the contract; but the supreme court replied that "local laws can never confer jurisdiction on the courts of the United States." In fact, it is well settled that local laws can neither enlarge nor diminish the admiralty jurisdiction, either by declaring those contracts to be maritime which are not, or those not maritime which are so by the admiralty law.

I think that the foregoing propositions settle all the claims in this case. They are all for materials, engines, machinery, work, or supplies furnished the original owners of the dredge in its original construction and equipment. As such, they come within the ruling of the supreme court in the case of *Roach v. Chapman*. The claims are not maritime, because they are for original construction and equipment. Not being maritime, the question of *home or foreign* vessel does not arise, and we have no need to examine the effect of the vessel law of New York. Not being maritime, the comprehensive law of Virginia, (chapter 235, p. 217, Acts of the Assembly, 1877-8,) giving liens

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and power of attachment against vessels foreign and domestic, can avail nothing in this court. In order to the existence of the admiralty jurisdiction in this court two things must concur—*First*, the claim must be maritime in its essential character; and, *second*, the lien must exist, either under the admiralty or the local law; a mere lien under a local law will not suffice of itself. I will sign a decree of dismissal as to the libel, and as to all the petitions in the nature of co-libels.

*United States District Court, District of Maryland,
April, 16, 1881.*

THE MARY SHAW.

A tug, with a vessel in tow, having given two blasts of her whistle without hearing any reply, steered in a narrow channel to pass an approaching steamer starboard to starboard instead of port to port, and did not repeat her signal until too late to avoid a collision, which took place between the steamer and the tow on the extreme edge of the channel. *Held*, that the tug was solely to blame.

Held, that there is no local custom in the channels in the Patapsco river, and in the Chesapeake bay, at its mouth, for large vessels descending the channels to take the easterly side, and that the establishment of such a custom, not being called for by any necessity, is to be deprecated as a dangerous departure from the settled rules of navigation.

IN ADMIRALTY. Cross-libel.

John H. Thomas and *A. Sterling Jr.*, for libellants.

Charles Marshall, and *Sebastian Brown*, for respondents.

MORRIS, D. J. These are cross-libels growing out of a collision between the British steam-ship *Gulnare*, 250 tons, and the schooner *Charles Morford*, 360 tons, in the Chesapeake bay, near the mouth of the Patapsco river, on March 5, 1881. The *Gulnare* left Baltimore, bound for the West

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Indies, on the afternoon of March 5, 1881, and at 7:30 P. M. was about two-thirds the way down the Craighill channel, when she met the steam-tug Mary Shaw coming up the channel with the schooner Charles Morford in tow.

The case stated by the libel filed by the owners of the Gulnare is that those in charge of her first saw the lights of the tug and tow at the distance of about two miles, and continued to see both their side lights until they had approached to within about three-fourths of a mile, when they heard one whistle from the tug, indicating that she proposed that the vessels should pass each other on the port side; that the Gulnare at once responded with one whistle, and ported sufficiently to shut out the green lights of the tug and schooner, and proceeded, keeping their red lights half a point or more over the steamer's port bow; that when the tug got within about three lengths of the steamer she blew two whistles and suddenly starboarded her helm, shut out her red light, showed her green light, and crossed the steamer's bow; that the steamer immediately stopped, reversed her engines, and succeeded in clearing the tug, and, while going astern, endeavored, by starboarding her helm, to turn her head to starboard so as to avoid the schooner, but that the schooner ported her helm when nearly abreast of the steamer, and being under the press of all her lower sails, struck the steamer near her port cat-head, and so injured her that it was found necessary to have her towed back to Baltimore for repairs.

The case stated by the answer of the owners of the tug is that she was coming up the Craighill channel, having the schooner in tow attached to her by a sixty-fathom hawser, and was near the western side of the channel, proceeding at about five miles an hour, when she first saw the lights of the steamer. They aver that it is customary for lighter craft approaching the port of Baltimore to give the eastern side of the channel to larger vessels, and especially to large steamers, as they can be more safely navigated on that side; that when the lights of the steamer were first seen, all her lights were visible, and that when she was between a mile

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and three-quarters of a mile off the tug gave two distinct and clear blasts of her whistle, indicating that the steamer should pass on the tug's starboard side; that *no response* was given by the steamer, but she continued to approach, showing both her side lights, when the tug again gave two blasts of her whistle, to which the steamer responded with two very faint whistles, but *continued to show her port light*, as if going across the course of the tug, when, perceiving that the steamer had not heeded her signals, the tug starboarded her helm, and the steamer passed her about the steamer's breadth off on the tug's starboard side, and came into collision with the schooner, the collision taking place outside of the western edge of the channel.

The Brewerton and Craighill channels form a continuous water-way from the Chesapeake bay to the port of Baltimore, the first being in the Patapsco river proper, and the latter in the Chesapeake bay at the mouth of the river, and nearly at a right angle with the first. They are from 250 to 400 feet wide, and were made by dredging out the natural channel. The navigation of these channels requires careful seamanship and an exact observance of every rule intended to prevent collisions. *Appleby v. Kate Irving*, 2 Fed. Rep., 924; *ante*, p. 146.

The rule governing steamers, and the signals they shall give when about to pass each other in these channels, is expressed in the eighteenth rule of the act of congress: "If two vessels under steam are meeting end on or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other;" and also by the pilot rules for lake and sea-board navigation:

"Rule 1. When steamers are approaching each other 'head and head,' or nearly so, it shall be the duty of each steamer to pass to the right or on the port side of the other; and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give as a signal of his intention one short and distinct blast of his steam-whistle, which the pilot of the other steamer shall answer

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promptly by a similar blast of his steam-whistle, and thereupon such steamers shall pass to the right or on the port side of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by the pilots as meeting head and head, 'or nearly so,' or if the vessels are approaching each other in such a manner that passing to the right (as above directed) is deemed unsafe by the pilot of either vessel, the pilot so first deciding shall immediately give two short and distinct blasts of his steam-whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam-whistle, and they shall pass to the left or on the starboard side of each other."

"Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way, until proper signals are given, answered and understood, or until the vessels shall have passed each other."

The answer of the tug and the testimony of her officers attempts to set up a custom by which it is claimed the statutory rule is superseded. By this alleged custom they assert the rule to be that large steamers and heavy ships always take the easterly side of the channel, that being the side marked by buoys, and therefore the safest for them to keep to. There is no current or tide to contend with, and the only reason for such a custom would be that the depth is somewhat more uniform on the easterly side, and the buoys being on that side, furnish a guide for more exact steering by daylight, and that in making the turn from the Brewerton into the Craighill channel it is more easily made on the outside of the curve.

The most experienced Chesapeake Bay pilots, in the

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habit of daily piloting the largest steamers, testify that there is no such custom. The president of the board of pilots expressly denies its existence, and says that they understand that the vessel desiring to proceed contrary to the statutory rule must get permission of the other vessel, and if the other vessel does not give it the rule must be obeyed.

No doubt the fact that heavy vessels do frequently ask for and obtain, by an interchange of signals, such permission, may have led to an expectation that they will usually ask it, and smaller crafts may, as a habit, hold themselves ready to accord it; but this is the extent to which the practice extends. It seems to me that its further extension is to be deprecated. These channels are traversed by vessels of all nations, and any attempt to depart from the well-known rules of maritime law, and to substitute local customs, not founded upon actual necessity, but upon mere convenience, is likely to lead to uncertainty and disaster. The dangers arising from a departure from settled rules of navigation have led admiralty courts to hold that the local custom which is to justify such departure must be founded upon necessity arising from permanent local peculiarities, such as rocks, strong currents in crooked rivers, and the like, and that the exception should be as distinct and definite as the rule itself. Lowndes on Collisions, c. 3.

In the present case those in charge of the tug seem to have mistaken the *Gulnare* for a large steamer, and to have expected that she would want the eastern side of the channel, and they gave her, at the distance of nearly a mile, two blasts of the whistle as a signal that they proposed to take the western side. They received *no* reply, as they state, but they steered for the western side and proceeded without any further signal until the steamer was within three lengths of them, when they signalled again. The vessels had then got into such proximity that a collision was imminent if not unavoidable.

The case of *The Milwaukee*, 1 Brown, Adm., 313, is in many respects similar to the one under consideration, and

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is very ably discussed by Judge Longyear. He very distinctly states the law applicable to the case of a steamer which, in a narrow channel, has gone contrary to the statutory rule, and undertakes to justify herself by an interchange of signals. As he states it, the burden of proof is upon such a vessel to establish by clear and satisfactory proofs—(1) That a proposition to depart from the statute was made by her by means of the prescribed signals, and in due season for the other vessel to receive the proposition and act upon it with safety; (2) that the other vessel heard and understood the proposition thus made; (3) that the other vessel accepted the proposition.

Taking the case as made by the answer of the tug, and the testimony offered on her behalf, it plainly appears that those in charge of her relied on their expectation that the steamer would desire to take the eastern side of the channel,—that is to say, upon the custom which they allege to exist,—and paid no attention to the fact that their signal was not answered.

Dr. White, a passenger of the schooner who happened to be in the tug's pilot-house, testifies that he saw the steamer's green light when the tug's first signal was given; that they received no answer, and then the steamer's green light was shut out, and they saw her red and continued to see her red light until the steamer was within about the length of the court-room, when the second signal was given; that the steamer then answered with two whistles; that he was getting alarmed, and he said to the mate: "It is all right, now he has answered;" and the mate replied: "Yes, but she is showing her red light all the time; she don't change her course."

Richardson, the mate, who was at the wheel, says, when he gave the first two whistles and starboarded his wheel the steamer was about three-quarters of a mile off, and he expected she would want the east side of the channel, and he steered to bring himself on the western side; that he listened for an answer, and, getting none, blew two more blasts, which were answered with two, and about that time

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the steamer's green light was shut in, and the steamer seemed about to run over them. He estimates that when the second signal was given the steamer was within two or three of her lengths from the tug.

The master of the tug, who was also in the pilot-house, tells substantially the same story. It is apparent, therefore, that those in charge of the tug, notwithstanding she received no answer to her first signal, persisted in going to the westward, and attempting to pass on the steamer's starboard side, until the steamer, continuing to show her red light and obviously also going to starboard, was so close that a collision with either the tug or her tow was almost certain. Whether the two blasts of her whistle, then given by the tug, were answered by the two blasts, as they claim, or with one, as those on the steamer testify, does not seem to me to be, in itself, a matter of serious importance, for neither vessel then had it in her power to perform any maneuver which would, except by some lucky chance, have averted the disaster. It is clear that the tug was in fault. I have had difficulty in satisfying myself as to whether or not the steamer was also to blame. No one, I think, could take up the consideration of the steamer's case without a leaning against her, and a predisposition to find her in fault. Her officers, although accustomed to the command of sailing vessels, were almost without experience in steamer navigation, and it was their first voyage in this steamer. They were not familiar with the channel, and they were running out in the night-time,—a very bold thing for them to undertake unassisted, and which reasonable prudence would seem to have forbidden. But because her officers were likely to fail in seamanship, I am not to take it for granted that they did, unless the evidence convicts them of it.

The steamer was, at the time of the collision, on that side of the channel on which she had a right to be; all her officers were at their posts of duty; they all testify that they heard the first signal of the tug, and that it was but one blast of the whistle, and that they answered it with one

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blast. The vessels were then nearly a mile apart, and it is quite possible that, without neglect, they did so understand it, more especially as one blast was the signal they naturally expected to get. That their reply was not heard on board the tug may have been because the steamer's whistle appears not to have been a loud one. Supposing the tug was going to pass them on the port side, they immediately put their helm a little to port. They declare that they saw nothing to undeceive them, as to the tug's intention, until they heard her second signal and saw her green light, and then they were so close that all they could do was to stop and reverse. That the bells to stop were at once rung and obeyed I have no doubt, although I do doubt the assertion that the steamer was going astern when the schooner struck her. There would not appear to have been time sufficient for a propeller to have stopped her headway and begun to go astern; but that her headway was greatly checked, if not entirely overcome, is, I think, demonstrated by the character of the damage resulting from the collision, as well as by the direct testimony of those on board the steamer. The actions of the officers of the steamer are all consistent with their account of the signals as they claim to have heard them and to have answered them, and, unless I were to assume that they were ignorant of the meaning of the signals, I do not find anything which the law recognizes as a fault to convict them of having contributed to bring about this collision.

It is not improbable that a pilot familiar with the navigation of the channel, and having some suspicion of the expectation which was in the mind of the master of the tug, might have discovered something in her movements which would have arrested his attention in time to have averted the consequences of the tug's fault; but to undertake to hold the steamer legally blamable because her officers did not have this high degree of local experience would be, I think, unwise, as by a strict adherence to the statutory rules the navigation of the channel should be safe to mari-

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ners having the ordinary experience and capacity necessary to navigate vessels.

I have not overlooked the question of the steamer's speed. She would appear to have been under three bells, at about three-quarters speed, say from seven to eight miles an hour. She was a very small steamer, easily handled, and drawing only from ten to twelve feet of water, and she could, without much risk of grounding, have run outside of the channel on either side. Such speed on a clear night, when lights can be plainly seen, is ordinarily perfectly safe for such a vessel, and I cannot see that under the circumstances it was improper.

I had in the case of *Appleby v. The Kate Irving*, 2 Fed. Rep., 924, to consider the question of speed in these channels, and in that case held the steamer to blame for proceeding at eight miles an hour, which was her full speed. That, however, was a heavily-laden steamer of 1,500 tons, compelled by her draught of water to keep in the channel, and keeping up her full speed with an obstruction right ahead and in full view; and in that case it appeared to me that the collision resulted in part from a sheer the steamer took arising in great part from her high speed and the difficulty of steering her in the channel, and that, as she had timely notice that the approaching vessels must get out of her way in order to avoid a collision, she should have slackened her speed or have been going at a less rate to enable them to do it, and I divided the damages.

In the present case, upon all the testimony, I am brought to the conclusion, although I confess with some hesitation, that the steamer is not in fault, and that the tug must bear the whole damage. Nothing has appeared to lead me to think that the schooner committed any fault, or that any mismanagement is to be imputed to her.

Syllabus.

*United States District Court, District of Maryland,
May 12, 1881.*

THE ENRIQUE.

A bill of lading for live beef cattle shipped by agreement on the deck of a steamer for a voyage from Baltimore to Liverpool, in December, 1880, contained, in addition to usual exceptions, a clause exempting ship-owners from any loss that might arise through cattle being jettisoned. *Held*, to mean that the ship-owner was not to be liable for contribution if the cattle should be thrown overboard for the safety of the ship. *Held*, that with regard to a deck load of live cattle this limitation of the ship-owner's liability was not unreasonable or against public policy. *Held*, if the cattle were thrown overboard because, during a prolonged storm, and without any fault of the ship-owner, they had got loose and were imperilling the ship, that under the limitation in the bill of lading the ship is exempted from contribution.

IN ADMIRALTY.

O. F. Bump and *I. S. Rosenthal*, for libellant.

T. W. Hall, for respondents.

MORRIS, D. J. The libellant seeks to recover the value of 126 head of beef cattle shipped by him on board the Spanish steamer *Enrique*, 2300 tons, at Baltimore, to be carried to Liverpool, and which were cast overboard on the voyage. By a contract dated December 2, 1880, the agent of the steamer agreed with the libellant, a large cattle dealer of Chicago, to let to him the deck freight room of the steamer for about 100 cattle on deck, the freight to be 60 shillings per head, payable in cash before sailing, and whether delivered or not delivered at Liverpool. The contract provided that the space for each beast should not be less than eight feet by two feet six inches, and that the stalls should be constructed at the ship's expense, to the satisfaction of the shipper and of the underwriters' inspector. It further provided with particularity for furnish-

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ing by the ship of water for the cattle, gangways for loading and unloading, space under deck for forage, free passage out and back for drovers, for six days' notice to shipper of steamer's readiness to receive the animals, and of the exact number the ship would take, and that the steamer should pay any additional cost of keeping the animals if the steamer did not sail at the expiration of the notice.

One hundred and twenty-six head of cattle, many of them weighing over 1,700 pounds, were duly put on board, under the superintendence of an agent of the libellant, on the eighteenth of December, 1880, filling up all the available deck room of the steamer, both forward and aft. The freight was paid in advance, and thereupon four bills of lading, all of the same tenor and effect, were delivered to and indorsed "accepted" by the libellant's agents. These bills of lading, among other things, stipulated that the cattle were to be carried on the upper deck, and that the steamship owners should not be responsible for any loss that might arise through the cattle being washed overboard or *jettisoned*. They also stated that the acceptance thereof was a recognition of the bill of lading as the contract binding both carrier and shipper. They contained in substance the same stipulation as to the contract for the care and feeding and watering of the cattle, and the usual exceptions against fire and the perils of the sea, and for liberty to tow and assist vessels, etc. The steamer sailed with a general cargo, principally cotton, grain and provisions, and about ten hours after leaving the capes of the Chesapeake encountered very rough and tempestuous weather, which lasted from the night of the 20th until some time in the night of the 24th, and in the gale that prevailed during that time the steamer shipped heavy seas, which broke down many of the stalls, carried away a portion of the rail, and did some other damage to the ship. In consequence of the violence of the storm some of the cattle were washed overboard. Some were drowned on deck, and some were badly crippled and injured. Almost from the commencement of the storm it was impossible to feed or water the

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cattle, and the rolling of the ship prevented those which were not injured from standing. On the 21st five were found dead, and thrown overboard. On the 22d, the storm not abating, the ship was hove to, and all the cattle aft of the foremast were cast over; and on the 24th, the storm still continuing, some twenty or thirty beasts remaining in the forward part of the deck, and which had been in some measure protected by the forecastle deck, were cast over. When the storm abated, on the night of the 24th, none of the cattle were left on board.

The libellant claims that the cattle were thrown overboard, not because they were dead or dying, and therefore unfit for further transportation, as is alleged by the respondent, but because it was necessary to jettison them to save the vessel and the rest of her cargo from impending danger. The libellant further claims that the acceptance of the bill of lading by his agent, who was appointed simply to attend to putting the cattle on board, was without authority and not binding upon him, and that the live-freight contract, and not the bill of lading, is to determine his rights; and further, that in any event the exception in the bill of lading for loss from the cattle being jettisoned is void as against public policy.

Counsel for libellant have strenuously contended that the paper called a "live-stock freight contract" is to be treated as a charter-party for the use of the deck of the steamer, and that being a charter-party the rights of the parties to it are not to be affected by the terms of the bill of lading. To this I cannot agree. The cattle were to be brought from Chicago to Baltimore for shipment, and as keeping them there would be attended with expense, the shipper required to know before they left Chicago that the steamer would be ready to take them, the number she would take, the amount of freight, and the arrangements for their care and subsistence. These matters are very carefully set out in the contract, but it contains none of the exceptions for the protection of the ship-owner usually to be found in charter-parties and bills of lading; and I

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cannot think it was intended to supersede the usual bill of lading. If it did, the ship-owners would, in effect, have become insurers of the safe delivery of the cattle, a result never contemplated by either party. The stipulations of the bill of lading do not contradict the contract, but are supplementary to it. It is shown that the libellant had made several shipments of cattle from Baltimore to Liverpool by steamers of this same line after making similar contracts with the same agents, and that in every instance precisely similar bills of lading, in sets of four, were given and accepted. The libellant's agent testified that of these four he had always sent one to the libellant at Chicago, one to the agent of the underwriters of the cattle, one to the consignees at Liverpool, and had given the other to the foreman of the drovers on board.

The case does not, as it seems to me, come within the principle of any of the cases cited, in which it has been held that, as between ship-owner and charterer, the charter-party should override the bill of lading in case of conflict between them. If, then, the bill of lading is to be treated as the evidence of the final contract between the parties in those particulars in which it is not found to contradict the previous contract, we are to consider whether its effect is to release the ship-owner from contribution for the cattle if thrown overboard to save the ship; and, if that is its meaning, is it such a limitation of the carrier's liability as the court should uphold? It is true that the defense made by the answer rests mainly upon the allegations that the cattle were cast overboard, not because they endangered the ship, but because they were either already dead or so nearly so as to be beyond hope of recovery. But this issue presents a question of fact naturally difficult to determine from the evidence. Unquestionably numbers of the cattle are shown to have been dead, or dying, when thrown over. All were greatly exhausted from want of food and drink, by the violence of the blows they received from the broken timbers of the pens and from each other, and from being thrown about by the pitching and rolling of the vessel, and

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from being drenched with salt water. Whether any, and if so, how many, it would have been possible, when the storm abated, to have resuscitated and delivered in Liverpool in merchantable condition, it would be difficult to determine. The five drovers employed by libellant, who were on board in charge of the cattle, contradict the officers of the steamship, and now undertake to say that a majority of the cattle, or at all events the twenty or thirty which were near the fore-castle hood, could have been saved, but it is evident they are speaking now with much more confidence than they did when first questioned on this subject. In the midst of a storm of such duration, with the pens broken down, the cattle loose and lying prostrate, and the seas washing over the deck, it is hardly to be supposed that a very critical examination of the beasts was made.

There is no suggestion that they were thrown overboard wantonly, and the effort of the libellant has been to show, from statements alleged to have been made to the drovers by the engineer, speaking for the captain, (who could speak hardly any English,) that he considered it essential to the safety of the ship that the cattle should go, giving as the reason that, the pens having got loose, the whole deck load was liable to shift to one side with the violent rolling of the ship, and also because the cattle, having got out of the pens, were likely to become entangled with the rudder chains on the deck. If the statements of these witnesses for the libellant are taken for truth, they make a case in which the cattle were cast over to save the vessel, and indeed the whole evidence shows a condition of peril in which jettison of such a deck load was justifiable. In the argument by counsel the question of the liability of the ship-owners for contribution for jettison was fully argued, and I am inclined to think it is the principal issue in the case.

The language of the bill of lading is: "Steamship owners are not responsible for any loss that may arise through cattle being jettisoned." This exemption, if the definition of the word "jettisoned" were substituted for the word itself, would read: "Ship-owners are not responsible for

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any loss that may arise through cattle being voluntarily thrown overboard in case of extreme peril, in order to lighten the ship and preserve her."

In *Crooks v. Allen*, L R., 2 Q. B. Div. 88, and *Schmidt v. Steamship Co.*, 45 L. I. Q. B. Div., 646, a bill of lading for goods to be carried through to their destination by steamship and railroad contained an exception from loss by "fire on board." This was held to have reference to the obligation of the ship-owner as carrier only, and to his contract as carrier to deliver the goods, and as not intended to take away the ordinary liability to contribute in general average as owner of the ship when a fire had occurred on board and the goods had been injured, not by the fire, but by water thrown down into the hold to extinguish it.

Such a construction cannot, it seems to me, be put upon the bill of lading in this case; for, unless the exemption for cattle jettisoned have reference to *contribution*, it can have no meaning at all, as, under the ordinary exception of perils of the sea in case of jettison, the ship could only be held for contribution.

It remains, then, to consider whether this restriction of the ship-owner's liability is so unreasonable, unusual, and inconsistent with sound public policy, that, looking to the situation of the parties, the court should refuse to uphold it. It is to be borne in mind that this limitation of responsibility in reference to a deck load is an exception to an exception, and that by it the general rule is made to prevail; the general rule being that goods carried on deck, though thrown over for the common benefit, give no claim for contribution. To this acknowledged and ancient rule exceptions have been recognized in more modern times, in cases where, by settled usage of trade or by the agreement of the parties, it is shown that the goods were properly to be carried on deck.

The transporting of live cattle across the Atlantic is shown to be a new undertaking. The present libellant states that he thinks he was, perhaps, among the first to attempt it, which was only three years ago. The earlier

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shipments were made in the summer months, and proved encouraging, but shipments in the winter months, as in this instance, are still to be considered, I think, rather an experiment than an established business. The risks are known to be exceptionally great. A high rate of freight is exacted in advance, determined by the number of cattle put on board and not by the number delivered, the underwriters demand a high rate of premium, and everything connected with the venture is matter of special agreement rather than of settled usage. Under these circumstances, why should not the parties be left to make their own bargains with regard to the transportation across the sea. They deal on terms of equality, and neither needs protection from the other. In this case, moreover, the libellant had on several previous occasions accepted similar bills of lading, and only by great inattention could he, or those to whom he entrusted his business, have failed to notice the limitation clause now resisted. It does not appear, therefore, that the limitation was an unexpected, unusual, or novel one. On the contrary, it is such an one as, it seems to me, the shipper might reasonably have expected the bill of lading to contain; and, however hardly it may result against the shipper, I cannot see, that with regard to a deck load, and looking to the general rules of maritime law with regard to deck lading, it can be said to be against public policy.

Being of opinion, therefore, that by the exception in the bill of lading, the ship-owner is exempted from contribution for the cattle jettisoned, I dismiss the libel

Syllabus.

District Court, District of Maryland, May 20, 1881.

THE BROTHERS.

Repairs were put upon a domestic vessel by a firm of ship-builders, of which one of the part owners was a member.

Libel *in personam* was instituted by the firm against all the part owners to obtain a decree against them *in solido* for the repairs.

Held, that such a libel *in personam*, in which the same person is one of the libellants and also one of the respondents, could not be maintained.

IN ADMIRALTY. Libel *in personam* for repair.

Thomas S. Baer, for libellants.

Sebastian Brown, for respondents.

MORRIS, D. J. This is a libel *in personam*, brought by Samuel T. Beacham and another, constituting the mercantile firm of John S. Beacham & Brother, against the said Samuel T. Beacham and 11 other persons, part owners of the bark Brothers. In 1878, Hays, one of the part owners, was the ship's husband, or managing owner; and, acting on behalf of all the owners, he let the bark for a voyage from Brunswick, Georgia, to Rio Janeiro. When she was about to enter upon her charter, she was discovered to be leaking and unfit for the voyage, and she was sent by the managing owner to the libellants' ship-yard, and had necessary repairs put upon her at a cost of \$1,627. She was soon afterwards lost at sea. Of the bill for repairs the libellants received a small sum from the managing owner, being the balance of the ship's earnings in his hands; and also received from him, and also from most of the other part owners, including Samuel T. Beacham, proportions of the balance of the bill equal to their respective shares in the ship. Certain others of the owners refused to pay anything, and this suit is brought against all to recover the unpaid balance of \$339.

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As to the defendants Baier Brothers, owners of one-sixteenth of the bark, I am satisfied from the testimony that they notified libellants at the commencement of the repairs that they would not be responsible for any part of the cost, and that libellants went on with the work, taking the risk of getting paid as to that share from the earnings of the vessel to come into the hands of the managing owner or by the other owners. As to the other owners who have refused to pay, while there is no evidence of express authority from them authorizing these particular repairs to be done, there is no evidence of any dissent; and as it appears that the managing owner had been acting as such for several years, and that during that time all matters connected with the management of the vessel and her employment had been committed to him, and that these repairs were necessary to enable the vessel to perform her charter, I think that *prima facie* he was agent of the owners, with authority to bind them for repairs, and that any restriction of this implied authority must be proved by the owners to have been known to the creditor. Maclachlan, 108; *Revens v. Lewis*, 2 Paine, 202.

There is, however, a defense set up of a technical character which I have not felt at liberty to disregard, and which I have not been able satisfactorily to answer. It is the objection that in no suit (except in equity) can the same person be one of the plaintiffs and at the same time one of the defendants. I do not see that in this case the objection could be cured by amendment. The suit is based and the libel is framed upon the liability of all the owners to respond to the creditor jointly and *in solido*. In such a suit the failure to join all the owners as defendants could be objected to by plea in abatement. Maclachlan, 117; 2 Conkling's Adm., 23; Benedict's Adm., § 387; 1 Parsons, Ship. and Adm., 118.

The defendants, who have paid their share, are still liable under this libel for the residue, (1 Parsons, Ship. and Adm., 102,) and the decree would be a decree in favor of Samuel T. Beacham and against Samuel T. Beacham, and could not

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be a decree against any of the defendants separately. *Jenks v. Lewis*, 1 Ware, 51; *Thomas v. Lane*, 2 Sumner, 1.

Courts of admiralty have no general jurisdiction to administer relief as courts of equity, and will not assume jurisdiction in matters of account between part owners. *The Larch*, 2 Curtis, 484; *Davis v. Child*, 1 Davis, 80; *Andrews v. Ins. Co.*, 8 Mason, 16; *Ward v. Thompson*, 22 H., 380; *Orleans v. Phœbus*, 11 Pet., 175; 1 Parsons, Ship. and Adm., 116.

I am constrained to think that the libel must be dismissed.

United States Circuit Court, District of Maryland,
May 21, 1881.

ANTOLA v. GILL & FISHER.

- * Under a charter-party which binds a vessel "now at Genoa and to proceed without delay to Baltimore; vessel having permission to take cargo of coals as ballast out," a delay of 31 days in beginning the performance of the contract, caused by discharging a cargo on board under a former contract, was such a delay as authorized the charterers to cancel the charter-party.

IN ADMIRALTY. Appeal from district court.

A. Stirling, Jr., for libellant.

Marshall & Fisher, for respondents.

WAITE, Circuit Justice. On the 29th of September 1879, Antola, the libellant and owner of the Italian bark Padre, through a firm of ship-brokers in Baltimore, chartered his vessel to Gill & Fisher, the respondents, to carry a cargo of grain from Baltimore to some safe port in the United Kingdom, or on the continent between Havre and Hamburg.

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The charter-party contained the following: "Bark * * * now at Genoa, and to proceed without delay to Baltimore to enter on this charter; vessel having permission to take cargo of coals as ballast out." When the charter was effected the vessel was at Genoa. She had arrived on the 28d of September, with a cargo of 987 tons of coal, to be delivered to consignees at that port. The delivery commenced on the 25th of September, but was not finished until the 30th of October. The vessel then took in sand for ballast, and on the 7th of November sailed for Baltimore. There was no unnecessary or unusual delay either in putting out the cargo or in getting ready to sail after that was done; under her contract for taking the coal to Genoa the vessel was allowed thirty-five tons a day, working days, to discharge.

After leaving Genoa the vessel proceeded on her voyage without unnecessary delay, and reached Baltimore on the 14th of January. She was then promptly tendered the respondents under her charter, but they refused to accept her, on the ground that she had not proceeded from Genoa to Baltimore "without delay." Thereupon the owner brought this suit *in personam* against the charterers to recover his damages. The district court on these facts, which are undisputed, dismissed the libel, and from that decree this appeal was taken.

We have had no difficulty in reaching the conclusion that the district judge was right in the view he took of the case. As he very properly said in his opinion, under the rule established by the supreme court in *Lowber v. Bangs*, 2 Wall., 728, the stipulation that the bark should proceed to Baltimore without delay was a condition precedent, and not a mere representation. Indeed, that was conceded in the argument here. If, then, that condition was broken by the owner, he cannot recover.

Charter-parties are commercial contracts, and must be construed accordingly. It was said by Mr. Justice Swayne, speaking for the supreme court, in *Lowber v. Bangs*, *supra*, 789:

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"Promptitude in the fulfilment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business. The result of a voyage may depend upon the day the vessel arrives at her port of destination, and the time of her arrival may be controlled by the day of her departure from the port whence she sailed. We cannot forget these considerations in our search for the meaning of this contract."

These observations are applicable to the present case. The contract was that the vessel should proceed without delay to Baltimore, to enter upon the charter. No intimation is given of any necessity for staying at Genoa to discharge. The language used clearly implies that there was nothing in the existing engagements of the vessel to prevent her entering on the performance of the new contract at once. As coal might be taken for ballast, it is possible that stopping for a reasonable time to put on such a cargo for that purpose might not be "delay" within the meaning of that term as then understood by the parties. That probably would be doing no more than was provided for, as ballast might be necessary to enable her to proceed. But permission to take ballast only implies such delay as is necessary to get the ballast on board. Its effect in the present charter was to bind the vessel to get her ballast on board if necessary without delay, and then proceed on her voyage to Baltimore.

The question then is whether this was done. We have no hesitation in saying it was not. The vessel was bound to begin the performance of the contract without *any* delay. Confessedly, she did not begin until the expiration of 31 days from the time the charter-party was signed, and this because it took her all that time to get rid of the obligations of another contract she was under to deliver a cargo she had on board to consignees in Genoa. In other words, she was *delayed* in the performance of her new contract because

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she was bound by an old one. She was not ready to proceed from Genoa when her charter sued on was effected, and her departure was afterwards unreasonably delayed, so far as the respondents are concerned. By staying at Genoa to discharge her cargo she saved the profits of her old contract, but we think she is not now in a condition to throw the losses of the new one upon her charterers.

It follows that the decree of the district court must be affirmed and the libel is, consequently, dismissed.

Circuit Court, District of Maryland, May 28, 1881.

THE MAGGIE MOORE.

- * A ship-owner charters his vessel to certain parties to go "to a safe point on the Continent between Bordeaux and Hamburg, orders to be given on signing bills of lading, * * * cargo to be delivered alongside of vessel, where she can load and discharge always afloat, lighterage if any at expense and risk of cargo." The cargo was loaded and the master without objection signed bills of lading to deliver cargo to charterers at Calais. On arrival, owing to the difficulty and shallowness of the harbor a long delay was experienced in getting to the dock and over the bar. *Held*,
1. That the master must object to the port to which he is ordered at the time of signing the bills of lading, if he considers it unsafe or not up to the requirements of the charter-party; or having accepted the port, must go as near as he can to float with safety and tender the vessel there;
 2. That being agent of the owner his signature of the bills of lading binds the owner, even if ignorant of the character of the port to which the shipment was made.

APPEAL IN ADMIRALTY.

Sebastian Brown, for libellant.

Marshall & Fisher, for respondents.

WAITE, C. J. Andrew K. Moore, the appellant and libellant, was the owner of the bark Maggie Moore, and

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on the twenty-fifth of August, 1879, through agents at Baltimore, he chartered his vessel to Milmine, Bodman & Co., the appellees and respondents, to take a cargo of wheat or Indian corn "from the port of Baltimore, Md., to a safe port on the continent between Bordeaux and Hamburg, both included; orders to be given on signing bills of lading; one port only to be used, or as near thereunto as she can always float with safety." Twenty-seven running days were given for loading and discharging; and for detention beyond that, by default of the charterers or their agent, demurrage at the rate of £18 per day, day by day, was to be paid. The charter-party also contained the following:

"The cargo or cargoes to be received and delivered alongside of the vessel, where she can load and discharge always afloat, within reach of her tackles. Lighterage, if any, to be at the expense and risk of the cargo. The charterers' liability to cease as soon as the cargo is shipped, but the vessel to have a lien on the cargo for all freight, dead freight, and demurrage."

The vessel was loaded under the charter, and on the twenty-fourth of October her master, without objection, executed bills of lading for the delivery of the cargo to the charterers or their assigns at the port of Calais, France, a commercial port on the continent between Bordeaux and Hamburg. The master was at the time personally unacquainted with the exact character of the port, having never been there. The harbor is somewhat difficult of access, owing to a bar at the mouth, which vessels requiring the water the Moore did when loaded can only pass at spring-tide. The dock in the harbor, within which, when in repair, vessels that could get over the bar would always remain afloat, had been for 18 months so much out of repair as not to be at all stages of the tide sufficient for that purpose. Except in this dock vessels like the Moore could not float in the harbor more than two or three hours during each tide.

The Moore, with her cargo on board, arrived within seven

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miles of Calais on the twenty-second of November. Her master was there informed by the pilot that on account of the tides it would be impossible to get her into the harbor for eight days. She was then taken to the downs, 21 miles from Calais, where she lay at anchor until the thirtieth of November. In the meantime her agent in London was in communication with a broker in Calais to find out when she could be got in. On the 30th, without waiting to hear further, her master engaged a tug and was about making another attempt to take the vessel over the bar, when he was told that a bark was aground in the mouth of the port and nothing could get in or out. He then went ashore and protested against the place to which the vessel had been sent under the charter. In hoisting an anchor at the downs so as to change the anchorage ground the windlass of the vessel was broken. In this and other ways she was detained, so that she could not take advantage of the tides and get over the bar at Calais until December 15th. She then got into the harbor, but was unable to pass over the sill at the gate of the dock with the water she was drawing. Notice was then for the first time given the consignees of the cargo of her readiness to discharge, and on the 17th she began unloading at the tidal quay outside the dock. After enough of the cargo had been taken out to enable her to pass the gates of the dock it was found she could not get a berth inside at which she could unload for some days, and an arrangement was made with the consignees by which the delivery was to be completed outside. Under this arrangement the unloading was finished on the fifth of January.

This suit was begun against the charterers *in personam* to recover such damages as the vessel sustained by her detention over and above what was covered by the provisions in the charter-party for demurrage, on the ground that Calais was not a safe port. There is no allegation in the libel of any specific damage to the vessel from grounding while in the harbor, and no injury to the vessel while she was detained is shown except the breaking of the windlass

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in getting up the anchor at the Downs. Upon these facts, which are undisputed, the district court dismissed the libel, and from that decree this appeal was taken.

The question which, as I think, lies at the foundation of the case is not whether Calais was a safe port, or whether if objection had been made at the time the vessel could have been required to go there under her charter, but whether, having gone without objection, the charterers are liable to the owner, under the provisions of this charter-party, for her detention while waiting to get over the bar and into the harbor. The charter-party did not fix definitely the port to which the vessel was to go. That was to be settled when the bills of lading were signed. The liability of the charterers, as charterers, was to cease when this cargo was shipped. Shipment is complete when the cargo is on board and bills of lading delivered. The vessel could not be required to go to a port which was not, in law, safe. From this it seems to me clear that, so far as the charterers' liability is concerned, the owner is limited, in respect to his objections to the port, to the time when he signs the bills of lading. If he accepts the port and gives bills of lading agreeing to deliver accordingly, he relieves the charterers from the liability under the charter on account of the port to which his vessel is to be sent, and transfers his claims for compensation from them to the cargo. Should he refuse to sign bills of lading for the designated port, the question would be at once presented between him and the charterers whether the port was a safe one. If it was, he would be liable to the charterers for a breach of his contract. If it was not, and the charterers refused to load for another port, they would be liable to him. If he accepts the port, as the bills of lading are to be construed in connection with the charter-party, his vessel would be bound to go only so near the port as she could always float with safety, and the consignees of the cargo could be required to accept a delivery of the cargo there. Demurrage would begin on the arrival of the vessel at that place and an offer to deliver there. If the consignee

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refused to receive the delivery at that place, he would be chargeable with the extra expense incurred by the vessel on that account. Such I understand to be the effect of the cases. *Capper v. Wallace*, L. R., 5 Q. B., 163; and *The Alhambra*, in the court of appeal, London, decided on the twenty-fifth of March last, a newspaper report of which has been furnished me. By signing the bills of lading the owner, through the master, agreed with the charterers that Calais was a port to which the vessel might be sent under the charter. His compensation, after that, was confined to such as he was entitled to upon the delivery of the cargo which he thus conceded the charterers had rightfully shipped.

It is contended, however, that, as the master was ignorant of the exact character of the port to which the shipment was made, the owner is not bound by his acceptance. The master was the agent of the owner to receive the shipments under the charter and sign the bills of lading. He could not alter the terms of the charter-party, but he was the representative of the owner in performing what it had been agreed should be done. If the owner would have been bound if he had personally accepted Calais as a safe port under the charter, he is bound by what has been done by the master. The master could not change the charter-party and agree, in express terms, to go to an unsafe port; but when a shipment was tendered him under the charter, for delivery at a well-known commercial port like Calais, to which vessels were accustomed to go, it was his duty to decide for the owner whether to sign the bills of lading or not. If he refused to accept the shipment and carry under the charter, his refusal was a breach of the contract, and bound the owner for damages in case the designated port was in fact a safe one. So, in my opinion, if he accepted, he bound the owner to deliver as the charter required. It was the duty of the owner to decide when the shipment was made whether it should be accepted under the charter. He deputed the master to perform that duty. The master decided to accept. That decision bound him. The risk of

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the incompetency of the master was on the owner and not the charterers.

I am entirely satisfied that the court below was right, and a decree may be prepared dismissing the libel.

*United States Circuit Court, District of Maryland,
June 6, 1881.*

THE ANN.

Under the Maryland oyster law of 1880, an oyster schooner, found dredging in the Chesapeake bay without a license, was seized, and with her master and crew carried into Annapolis by the state oyster police. The master and crew were tried before a justice of the peace and fined, and upon non-payment of the fine the vessel was forfeited and sold.

Held, that the forfeiture and sale were valid ; that the law was not repugnant to the state constitutional provision, that in all criminal prosecutions every man shall be entitled to trial by jury.

Held, also, that the law was not repugnant to the provision of the federal constitution, that no state shall deprive any person of his property without due process of law.

Held, that the seizure of the vessel was notice to the owner, and that, as the law provided for an appeal by the owner from the decree of forfeiture, he could make himself a party to the case and defend his rights.

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IN ADMIRALTY.

George W. Wayson, for libellant.

Robert H. Smith, for respondents.

Att'y Gen. Gwynn, for the state.

MORRIS, D. J. This controversy was commenced in this court by a libel filed by seamen for wages against the schooner *Ann*, a small domestic vessel, of the port of Balti-

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more. Two different claimants appeared, asserting ownership of the vessel, and several petitioners have appeared claiming to have liens for repairs to the vessel under the state lien law.

The schooner is one of the class of vessels used for dredging oysters in the Chesapeake bay, and on November 10, 1880, the seamen shipped on her as oystermen and sailors for the purpose of taking oysters in the Chesapeake bay—some of them by the month and some by the trip. On the fourteenth of November the master and crew and the schooner were taken into custody by the state oyster police, and carried into Annapolis, charged with dredging for oysters without a license, in violation of the state law. The master and crew were tried before a justice of the peace, found guilty, and fined. At the expiration of 20 days, the fine and costs not having been paid, the vessel, which had been held in custody from the time of seizure, was adjudged forfeited, and the justice ordered that the sheriff of the county should sell her, after having given 20 days' notice.

In pursuance of the decree of the justice the sheriff sold the vessel at public auction, after notice, on December 27th, when she was purchased by the claimant Saunders, to whom she was delivered, and in whose possession she was found by the marshal when taken under the process issued from this court at the instance of the libellants. She is also claimed by Mrs. Alice Thorington, wife of the master in command of her when she started on her dredging trip. Mrs. Thorington held the title to the vessel at that time and she has filed a petitory libel.

The authority for the proceedings under which the schooner was seized by the oyster police, forfeited, and sold, is the act of the assembly of Maryland of 1880, c. 198, known as the "Oyster Law," and by these libels and petitions in this court it is sought to question the constitutional validity of that law. The Maryland oyster law of 1880, by section 2, provides that no boat shall be used in dredging oysters in the waters of the state of Maryland without first

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having been licensed, for which a certain rate per ton is to be paid to the state. Section 16 provides that the number of the license shall be displayed on the starboard side of the mainsail, and on the port side of the jib, in black figures, 22 inches long. Section 9 makes it the duty of any sheriff, constable, or officer of the state fishing force to arrest any person or persons, and seize any vessel, found violating the provisions of the act, and to bring the offenders before a judge or justice of the peace. Section 10 provides that the judge or justice of the peace shall either give the case an immediate hearing, or, at the instance of the parties charged, shall appoint a day within the next 10 days to hear the case, and on conviction shall fine the offenders not less than \$50 nor more than \$300, or sentence them to imprisonment in some house of correction; and that the vessel used in such violation shall be held until said fine and costs are paid, and if the fine and costs are not paid within 20 days, the judge or justice shall decree the vessel forfeited, and shall have authority to order any sheriff or constable to sell her after giving 20 days' notice; the proceeds to go to the payment of fine and costs, and the balance to the owner of the vessel. It is also provided that the owner, or any person convicted under the act, shall have the right of appeal to the circuit court of the county. The act contains other and different provisions with regard to vessels owned wholly or in part by any non-resident of Maryland.

The first objection urged against this state law is that it is repugnant to the declaration of rights and constitution of Maryland, by which in all criminal prosecutions every man is declared to be entitled to a trial by jury, (article 21,) and by which it is declared (article 23) that no man ought to be taken or imprisoned or deprived of life, liberty, or property but by the judgment of his peers or the law of the land.

This is a question which it is the appropriate duty of the state tribunals to determine. In the recent case of *State v. Green*, the Maryland court of appeals, after full argument and careful consideration, sustained the constitutionality of

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the vagrant act of 1878, against which similar objections had been urged, and decided that these declarations of the bill of rights and constitution of Maryland were merely declaratory of rights long settled among our people by usage and the course of law, and were not intended, and had never been considered as intended, to prohibit the state from providing for the summary trial and imprisonment of vagrant and disorderly characters, or the enforcement by short imprisonments of mere police ordinances.

It is to be noticed in this case that the forfeiture of the vessel was founded, not upon any sentence of imprisonment of the offenders, but upon the non-payment of the fine imposed upon them for violation of a law requiring a license. It is not, therefore, necessary to sustain that part of the law giving jurisdiction to the justice to punish the offenders by imprisonment in order to sustain the validity of the forfeiture of the vessel.

The right of the legislature to give jurisdiction to justices of the peace to impose fines has long been "the law of the land" in Maryland, and it has been held in her appellate court that actions to recover fines are civil actions, although the penalty for non-payment may be imprisonment. *Mace's Case*, 5 Md., 837. The right of all governments, notwithstanding similar constitutional prohibitions against taking property of the citizens "but by the law of the land" or "without due process of law," to proceed by summary process of distress or fines or penalties to enforce payment of revenue, is elaborately discussed and fully sustained by the supreme court in *Murray v. Hoboken Land Co.*, 18 How., 272.

In advance of such a construction by the state tribunals, I am not at all prepared to hold that the Maryland legislature is prohibited by her constitution from conferring jurisdiction upon justices of the peace to try and fine offenders against her revenue laws, or against her laws for the protection of her fisheries. All possible risk of oppressive abuse would seem to be guarded against in this law of 1880 by the right of appeal to a court sitting with a jury.

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The next objection urged against the forfeiture and sale of the vessel, and against the title of the purchaser to whom she was sold and delivered by the sheriff, is that there was no notice given to the owner or other persons having interest in her, and that, therefore, the proceeding as against them was void, as being an attempt of the state to deprive them of their property "without due process of law," contrary to section 1 of the fourteenth amendment of the constitution of the United States.

The act of 1880 provides that the state officers shall seize and take into custody the vessel found violating the provisions of the act, and if, upon trial and conviction, the offenders do not pay the fine imposed upon them within 20 days, then the justice shall direct the vessel to be sold after 20 days' notice.

The supreme court of the United States, in *Smith v. Maryland*, 18 How., 75, passed upon the validity of the Maryland oyster law of 1833, by which every vessel employed in catching oysters with a dredge was declared forfeited to the state, with everything on board of her. In that case the vessel belonged to a non-resident of the state, and was condemned by a justice of the peace of Anne Arundel county, and, upon appeal to the circuit court of that county, the judgment had been confirmed. The case, by writ of error to the Anne Arundel county court, was brought before the supreme court, and that court, after sustaining the constitutionality of the state oyster law of 1833, as not being repugnant to the power of congress to regulate commerce, proceeds to say, (p. 75 :)

"And it is the judgment of this court that it is within the legislative power of the state to intercept the voyage, and inflict the forfeiture of a vessel, for disobedience, by those on board, of the commands of such law. To inflict a forfeiture of a vessel on account of the misconduct of those on board—treating the thing as liable to forfeiture because the instrument of the offense—is within the established principles of legislation which have been applied by most civilized governments."

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In the same case the supreme court also held that the law of 1883 was not repugnant to the provisions of the federal constitution which confers all admiralty and maritime jurisdiction upon the courts of the United States.

It is true that there was no notice, by service or publication of notice, to the owner or holders of maritime or other liens, that the vessel was being proceeded against; but a proceeding *in rem* forms an exception to the general rule of notice, particularly when based upon actual manucapation of the thing which is the instrument of the wrong, and in such cases the *seizure* has been held to be constructive notice to every one having any interest in the thing seized.

The supreme court, in *The Mary*, 9 Cranch, 144, has said:

"The whole world, it is said, are parties in an admiralty cause, and therefore the whole world is bound by the decision. The reason of the *dictum* will determine its extent. Every person may make himself a party, and appeal from the sentence. * * * Where proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served on the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in the thing to guard that interest by persons who are in a situation to protect it."

But it is also a just qualification of the foregoing rule that, unless the party to be affected with the actual or constructive notice would, if he had appeared, have been allowed to assert his right, and be heard in its defense, the proceeding cannot affect him. *The Mary*, *supra*; *Windsor v. McVeigh*, 93 U. S., 277; *Bradstreet v. Ins. Co.*, 3 Sumn., 607; *The Henrietta*, 1 Newb., 292.

In the present case, with regard to the owner of the schooner, the act of 1880 provided that she might have a right of appeal from the decree of forfeiture, and she was thereby given a right to be heard. With regard, however, to any other persons having maritime liens or interest in the

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vessel, I cannot see that the law made it possible for them in any way to intervene and defend their rights. It is not necessary, however, in this case that I should determine how far the decree of forfeiture might affect persons, other than the owner, having liens on the vessel, for the reason that I do not find the lien claims in this case are established. In order to entitle the seamen to a maritime lien for their wages they must be innocent of all knowledge of, or participation in, the illegal voyage. *St. Jago de Cuba*, 9 Wheat., 409.

The law required that the vessel should have a license, and that its number should be displayed upon her sails. This law the seamen, as well as others, were bound to know. Not seeing the number on the sails, they knew, when they engaged in dredging in the waters of Maryland, that they were engaged in a prohibited employment.

As to the lien claims of the material-men for repairs, I am obliged to hold them all defective for want of compliance with the requirements of the state lien law. The only one which there has been any serious attempt to sustain is that of the Chesapeake Marine Railway, and that fails from not having been filed within the time prescribed by the law.

Libels dismissed, with costs.

United States Circuit Court, District of Maryland,
June 16, 1881.

THE FARNLEY.

The sailing vessel claimed that she altered her course *in extremis*, and to ease the blow. *Held*, upon the facts as found by the court, that the sailing vessel unjustifiably altered her course, and contributed to bring about the collision; that if she altered her course at all she should have so acted as to aid the steamer in avoiding the collision.

Facts found by the Court.

Held, that the steamer was also in fault, when she had plenty of sea-room, in passing the sailing vessel in the night time so close as to allow a collision to result from a miscalculation of those in charge of the sailing vessel. *Held*, that the damages must be equally divided.

APPEAL IN ADMIRALTY.

FACTS FOUND BY THE COURT.

(1) A collision occurred in the Chesapeake bay about 7:30 in the evening of the eighth of September, 1879, between the American schooner A. R. Weeks, in charge of an American master, bound from Baltimore to Boston, and the British steamer Farnley, in charge of a licensed bay pilot, on her way, in a partially disabled condition, to Baltimore for repairs. The sun set that evening at about 6:20, and the moon was just approaching its last quarter. The night was clear. The wind was north-westerly, and blowing about a seven-knot breeze.

(2) From the place of collision Sharp's island light bore about S. E., and was from three to four miles distant.

(3) According to the sailing directions given on the official coast charts, vessels going up the bay take a N. by W. $\frac{1}{4}$ W. course until they reach a point from which Sharp's island light bears E., four and one-quarter miles distant, thence N. $\frac{1}{4}$ E. a little less than ten miles, and thence N. by E. $\frac{1}{4}$ E. Going down, of course, they take the opposite direction. The collision occurred, as near as can be ascertained, from two to three miles above the point for change of course from N. by W. $\frac{1}{4}$ W. to N. $\frac{1}{4}$ E.

(4) The schooner was making about seven miles an hour, and was able to take any course she chose.

(5) The steamer was going up against the wind, using only one boiler, as the other was disabled. She was making only about four miles an hour, but was under complete control. She had left Baltimore the morning before, bound for Antwerp, Belgium, with a cargo of 98,000 bushels of grain, but on her arrival near the Wolf Trap light it was discovered that her port boiler was in such a leaky condi-

Facts found by the Court.

tion as to make it unsafe to go to sea without repairs. At 6:30 in the morning of the 8th she put back to Baltimore, using only the starboard boiler. She had been all day getting from about three miles above Wolf Trap to the place where the collision occurred.

(6) The schooner had on deck from 6 o'clock until the time of the collision her master, who had commanded her most of the time since she was built, in 1873, and who had been a master mariner for about twelve years; her second mate, an able seaman, and an inexperienced boy. The master was in command, and the seaman standing at the bow as look-out and performing that duty. The boy took the wheel when the watch began, but the second mate was steering when the collision occurred. At what precise time he relieved the boy is not satisfactorily shown. The boy was manifestly incompetent to perform such a service, and so known to be. When the second mate took the wheel the boy was sent to shovel over ballast. All the regulation lights were properly set on the schooner and burning.

(7) The steamer had the pilot on the bridge, the mate on the skeleton bridge, a look-out at the bow standing on the forecastle, a quartermaster at the wheel, and a sufficient number of men on deck standing their watch. The bridge is from six to eight feet above the deck, and the skeleton bridge about the same distance above that. The steamer was 280 feet long.

(8) The vessels were seen from each other a considerable time before the collision, and when they were from one to two miles apart, at least. When first seen they were sailing substantially in opposite directions. They continued to approach each other end on, or nearly end on, so as to involve risk of collision, until they were not more than three or four hundred yards apart, when the steamer put her wheel to port so that each might pass on the port side of the other. Almost immediately after this was done her wheel was put hard a-port, and she fell off her original course six or seven points to the eastward before the collision. Shortly after the steamer began going off under

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her port wheel, and without any sufficient cause or excuse for so doing the schooner put her wheel to starboard, under the effect of which she also fell off to the eastward. If her wheel had been ported instead of starboarded the vessels would not have come together.

(9) In the collision the schooner struck the steamer on the port side, near the end of the bridge, and but little forward of midships. The cutwater of the schooner was bent over by the blow from starboard to port, and her starboard bow to a distance ten feet back from the stem was broken. Her port bow was not injured except at the stem. She filled and sank in less than an hour.

CONCLUSIONS OF LAW.

(1) That the steamer was in fault for attempting to pass too close to the schooner, and not taking sufficient precautions in time to get by in safety.

(2) That the schooner was in fault for unnecessarily and inexcusably starboarding her helm, and thus bringing on the collision.

(3) That the damages to the two vessels should be equally divided between them.

(4) That the master of the schooner is entitled to recover against the steamer only one half his loss.

(5) That the owner of the cargo of the schooner is entitled to a decree against the steamer for the full amount of its loss.

(6) That on payment of the steamer of the decree in favor of the owner of the cargo, the steamer will be entitled to credit for one half the amount so paid on any decree which may be rendered against her in favor of the schooner.

WAITE, Chief Justice.

Robert H. Smith and Sebastian Brown, for libellants.

Thomas & Thomas, for respondents.

WAITE, C. J. It would be a useless task to attempt to

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reconcile the conflicting evidence in this case. There are, however, some conceded facts. The steamer was going up and the schooner down the bay. The wind was north-west, or perhaps a little north of that. The libel alleges it was north-west, and the master and second mate of the schooner say the same. The pilot of the steamer says it varied from N. N. W. to N. W. Both vessels were in a condition to avail themselves of the most desirable courses up and down the bay. They were where, according to the official chart, that course would be N. $\frac{1}{4}$ E. or S. $\frac{1}{4}$ W., and about four miles to the west of Sharp's island light. The schooner had her sails off to port. That is where they would be if she was sailing on the course given by the chart. The wind was about a seven-knot breeze. The schooner was going at the rate of about seven miles an hour and the steamer four.

Each vessel saw the other a considerable time before the collision, and when they were certainly more than a mile apart. The regulation lights were properly set and burning on both vessels. Before the collision the steamer put her wheel to port, and soon after hard a-port. Under the operation of this helm she fell off to the eastward several points. Not long after the steamer began to fall off, the schooner put her wheel hard a-starboard, which carried her also off to the eastward. In the collision the schooner struck the steamer, which was 280 feet long, about midships. The cutwater of the schooner was bent by the blow from starboard to port, and her starboard bow, to a point ten feet back from the stem, was so much broken that she filled and sank in less than an hour. The port bow of the schooner was not injured at all, except, perhaps, directly at the stern.

So far there is no dispute. The issue between the parties may be thus stated: The schooner claims to have been sailing for a half hour before the collision on a course S. by E. $\frac{1}{4}$ E. Before that time her course had been S. by W. $\frac{1}{4}$ W. About a quarter of an hour before the collision the look-out of the schooner saw and reported the mast-head

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light of the steamer bearing about one point over the starboard bow. Not long afterwards the green light of the steamer appeared in the same direction. These lights continued in sight without any material change of bearing until the vessels got within three or four hundred yards of each other, when suddenly the steamer went off to the eastward, exhibited her red light, and started directly across the bow of the schooner. No change was at first made in the course of the schooner on this account, but when the bow of the steamer came opposite that of the schooner, the wheel of the schooner was put hard a-starboard, and she too fell off somewhat to the eastward before the vessels came together. The change of course by the schooner, it is claimed, was because the steamer had, by her unskilful movements, made a collision inevitable, and such a change was necessary in order to avoid more disastrous consequences.

On the part of the steamer it is claimed that she was going up the bay on a course N. $\frac{1}{2}$ W., when her pilot on the bridge and looking through a glass saw the sails of the schooner almost directly ahead and some miles away. Not long afterwards the red light of the schooner appeared, bearing somewhat less than a point over the port bow. This light, as the vessels approached each other, drew slightly to port. The pilot, after awhile, thinking it prudent to widen somewhat the distance between the courses of the two vessels and to show his red light decidedly to the schooner, ported her wheel. Almost immediately afterwards the schooner seemed to be falling off in the same direction. At first both her green and red lights were displayed to the steamer, and then her green alone. As soon as the change in the course of the schooner was made, the wheel of the steamer was put hard a-port, but the engines were not stopped.

The difficulty is in relation to these claims. The testimony on both sides is positive. It was undoubtedly the duty of the steamer to keep out of the way of the schooner, but it was equally the duty of the schooner not to embar-

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rass her in her efforts to that end by an unnecessary change of course. When two sailing-vessels or two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, the statutory sailing rules require both to put their helms to port, so that each may pass on the port side of the other. Rev. St., § 4233, rules 16, 19. The supreme court has said that ships would be meeting end on, within the meaning of this rule, when they were approaching each other from opposite directions, or on such parallel lines as to involve risk of collision on account of their proximity. *The Nichols*, 7 Wall., 664; *The Dexter*, 23 Wall., 69. I am satisfied from the evidence that, under this rule, these vessels were approaching each other nearly end on. This may be fairly inferred from what is said by the witnesses on both sides, when taken in connection with the admitted facts. It is not pretended by those on the schooner that the steamer was seen at any time more than one point over their starboard bow, and she kept that position without any change at all until the vessels were within three or four hundred yards of each other, and probably less, according to the statements of the witnesses. In that time the vessels together ran more than a mile. So, on the steamer, the schooner, when miles away, according to the statements of the pilots and others, appeared to be almost directly ahead. When her red light was first seen it bore less than a point over the port bow, and it at no time opened much, if any, more than a point in that direction. According to the testimony from the schooner, the first indication of any change of course in the steamer was when the red light appeared, and it was but a very short time after that before the bow of the steamer came across that of the schooner. Then the schooner starboarded her wheel, and the steamer had only time to get far enough by to receive the blow midships or thereabouts. The testimony from the steamer is that, although her wheel was put hard a-port, and she kept on at her full speed of four miles an hour, the schooner, by starboarding, was able to overtake and collide with her before she could get out of the way. All this

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indicates most unmistakably to my mind that, whether the steamer was in fact a little to the east or a little to the west of the schooner, the lines of the courses of the two vessels were from the beginning in dangerous proximity. This conclusion is strengthened by the further fact that the collision occurred not very far from the place where the vessels would be likely to be if they had followed closely the sailing directions given upon the chart, which both vessels were perfectly able to do. The steamer, loaded and disabled as she was, would be almost certain to take the most desirable route, which could not but have been known to her pilot of more than 34 years' experience, and no reason is given why the schooner should not have done likewise.

The statutory rules do not require a steamer, when meeting a sailing vessel end on, or nearly end on, so as to involve the risk of collision, to port her wheel and let the vessels pass port to port, but, other things being equal, that would be the natural impulse of every navigator. Custom has made that the almost universal rule of the road both on land and water in this country. Approaching as the vessels were, the schooner ought to have looked for a change of course on the part of the steamer and to have been prepared to act in a way not to interfere with what she did. While the steamer might not decide to pass port to port, it was certainly most probable that she would. The wind was on her port bow and would help her in going off to the eastward, while it would be a serious obstacle to her getting to the westward or port. Under these circumstances, to wait any appreciable length of time after the red light appeared and then steer so as to counteract the known and, as it seems to me, under the circumstances, proper movement of the steamer, was, to my mind, a clear fault. I cannot but believe that if instead of starboarding the master of the schooner had ported his helm there would have been no collision, and I am by no means certain there would have been any if he had kept his course.

It is claimed, however, that the helm was not starboarded until after the steamer had, by unskilful navigation, made

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the collision inevitable, and that it was done to ease the blow. This I cannot believe to be true. I have been unable to put implicit confidence in the unsupported statements of the principal witnesses on either side. The testimony of the master of the schooner and the pilot of the steamer is full of inconsistencies, and in many particulars contradicted by the admitted facts. It is conceded on the part of the schooner that up to within a half hour before the collision she had been sailing S. by W. $\frac{1}{4}$ W. That varied only one-quarter of a point from the course indicated on the chart until the place was reached where a change should be made to S. $\frac{1}{4}$ W. If at that place the vessel had been put on a S. by E. $\frac{1}{4}$ E. course it would have taken her over the shoals at the south end of Sharp's island. Had she kept on S. by W. $\frac{1}{4}$ W. until she could clear these shoals on a S. by E. $\frac{1}{4}$ E. course, she would have been taken far to the westward of the line the steamer would naturally be on in going up. In approaching the steamer, under such circumstances, she would see the red light of the steamer over her starboard bow and not the green, unless the steamer should be going N. by W. $\frac{1}{4}$ W., or nearly so; a thing not at all likely, as her true course would be so as to make N. $\frac{1}{4}$ E. As the collision, probably, occurred somewhat to the eastward of the course indicated on the chart, and which was drawn N. $\frac{1}{4}$ E. from a point $4\frac{1}{2}$ miles west of Sharp's island light, and the steamer went off but little from the course she was originally on, it seems to me clear that if the schooner had been for half an hour on a S. by E. course, she could not have seen the green light of the steamer. Under such circumstances the green light of the schooner would have been, probably, presented to the steamer, but the red of the steamer would have been presented to the schooner. It is also a noticeable fact that although it is said those on the schooner at first saw the green light of the steamer alone, and then the red, no one saw both the red and green together, although they must have been shown at some time if the steamer so materially changed her course, as is alleged, when near by.

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Under all the circumstances I do not think the schooner has excused herself from the fault of starboarding her wheel. The steamer, moving as she was slowly through the water, must have occupied considerable time in bringing herself from her course up the bay to one almost directly across. When she was going up she was heading lengthwise of the bay, and if the schooner had herself ported as soon as she saw the red light, it seems to me clear that a less variation from her course would have been necessary to get her by, than was afterwards required to ease the blow by falling off to starboard.

Another circumstance is equally significant: If the wind was N. W., as it probably was, and the schooner going S. by E. $\frac{1}{2}$ E., the wind was within two and a half points of being directly over her stern. Any considerable change to the east under her starboard helm must necessarily cause her to jibe. This, the pilot of the steamer says, actually did occur. In jibing she would certainly be more unmanageable, and require more attention from the officers and crew, than she would if she had ported and attempted to come further up into the wind. Besides this, it is conceded she had on deck at the time, standing his watch, an incompetent boy. For some time after 6 o'clock he had been steering. When he left the wheel is by no means satisfactorily shown. The second mate says he himself took the wheel at five minutes past 6, and set the boy to shovelling ballast. The boy leaves the impression from his testimony at first that he was not at the wheel at all, but afterwards he said distinctly he had been steering until about half an hour before the collision, when the second mate relieved him, and told him to shovel over the ballast. He also said if he had not been working at the ballast he should have been steering. From all the evidence, it is clear that, notwithstanding his incompetency, he was accustomed to take his turn at the wheel, and I am by no means satisfied that he had not been at the wheel up to the time the vessels got into dangerous proximity.

Without pursuing this branch of the case further, it is

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sufficient to say I am satisfied, from all the evidence, that the starboarding of the helm of the schooner contributed directly to the collision, and that it was a fault. It was a wrong move, and no sufficient reason is given for making it. Neither do I think the schooner can be excused on the ground that it was done in the excitement of the moment, and when there was no time for the exercise of deliberate judgment. The master saw the steamer going off suddenly to port. He waited an appreciable length of time after he saw the red light before doing anything, and then deliberately did what was exactly wrong. The most ordinary prudence would have dictated to him, as soon as he saw the red light coming diagonally across his bow, as it must have done according to his own showing, if he altered his course at all, to port his wheel and help the steamer in what she was doing. Any other alteration in his course at that time was a fault, and entirely inexcusable.

It only remains to consider whether the steamer was also in fault, and I am clearly of the opinion she was. Upon her rested the responsibility, under the statute, of keeping out of the way of the schooner. As has already been seen, the vessels were approaching each other end on, or nearly end on, so as to involve the risk of collision. This condition of things continued until the order to port the helm of the steamer was given, which, according to the allegations of the answer, was only a few seconds before the order "Hard a-port."

The averments of the answer in this particular are supported both by the mate and the wheelsman. The pilot swears differently, but the conceded facts and corroborating circumstances are all against him. I am satisfied the answer states the truth. The collision, all agree, occurred a very short time after the order "Hard a-port." At most, according to all the evidence, the vessels did not sail more than three or four hundred yards, which, at the combined speed they were going, could be traversed in but little if any more than a minute. That haste was required on the part of the steamer to get out of way is apparent from the

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fact that the order "Hard a-port" followed sharply on that to port. Under these circumstances it seems clear to me that the steamer held her course too long without making calculations to get by. It is undoubtedly true that if the schooner had ported her helm, instead of starboarding, the collision would have been avoided; but that, in my opinion, does not excuse the steamer from her original fault in getting so close as to make it possible to bring the vessels together in such a way. When there is plenty of sea-room, and nothing to prevent, it is wrong for a steamer, in passing a sailing vessel at night, to go so near as to permit a collision in consequence of a mistake of this character on the part of the schooner. It is her duty to give a passing vessel a wide berth when it can be done, and to run no risk of errors or miscalculations.

As both vessels were in fault the damages to the vessels must be equally divided between the two. As the master of the schooner himself, by his personal conduct, contributed to the loss, his recovery against the steamer must be confined to one-half his damages. The owner of the cargo is entitled to a decree against the steamer for the full amount of its damages, but, upon payment of the amount found due, the steamer will be entitled to credit on any decree that may be rendered against her and in favor of the schooner for one-half the sum so paid.

An order may be entered referring the cause to a commissioner to ascertain and report the amount of damages sustained by the parties respectively.

*United States District Court, Eastern District of Virginia,
at Norfolk, July 13, 1881.*

**THOS. K. JAMES v. 216 LOADS AND 678 BARRELS OF
FERTILIZER.**

The lien for freight or demurrage of the vessel upon the cargo is terminated by the delivery of the cargo.

IN ADMIRALTY.

This was a libel by the master of a schooner upon the cargo, for demurrage, on a claim of having been delayed by the consignee in the delivery of the cargo. This was finally delivered on the 11th, 12th and 13th of April, 1881. The libel was filed on the 13th and process served on the 14th. At the time of service of process the cargo had been all delivered to the consignee; who came into court and deposited in the registry the amount of freight due.

HUGHES, J. There is no doubt that a cargo may be libelled for freight so long as it is on the vessel or in custody of a wharfinger or warehouseman, holding either actually or constructively for the owner of the vessel. But when the cargo has been absolutely delivered to the consignee against whom the freight is claimed, the maritime lien is lost, and the jurisdiction of the admiralty court to enforce it, is lost with it. For it is settled law that "the lien of a ship-owner for freight, being but a right to retain the goods until payment of freight, is inseparably associated with the possession of the goods, and is lost by an unconditional delivery to the consignee." See the opinion of Chief Justice Taney in *Bags of Linseed*, 1 Black, 108. The libel must be dismissed at the libellant's costs; and the clerk may check upon the fund in bank for the costs, and after deducting these, then in favor of the master for the residue of the sum.

*United States District Court, Eastern District of Virginia,
at Norfolk, July 18, 1881.*

BAKER ET ALS. v. THE WM. GATES.

* Among maritime liens of otherwise equal dignity, the lien-holder first instituting proceedings to enforce his claim is entitled to priority of payment.

IN ADMIRALTY.

Sharp & Hughes, for Baker, libellant.

Ellis & Thom, for Mayer & Co., petitioners.

HUGHES, J. Clarke's *Praxis*, which is of highest authority on admiralty law, lays down the following principles in Title 44 under the head of *The seizure of goods by different creditors*: "If any one is indebted to different persons, for the purpose of recovering their debts of that person, separate judicial warrants will lie against the goods of the debtor, to procure their arrest; if the goods seized are not sufficient for the payment of all the creditors, he is to be preferred, and will first obtain a judicial decree, for the possession of the goods, who first institutes his suit aforesaid or had the goods aforesaid seized; the same order and form is also to be observed as to the remaining creditors, if after the full payment of the first creditor any goods remain, although not enough to pay all the rest."

I think the general teaching of the cases reported is in support of these principles, the exceptional rulings being due to exceptional circumstances presenting themselves in particular cases.

I feel bound to decree in accordance with these principles, paying Baker first, Mayer & Co. next, and then the petitioners *pari passu*.

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[NOTE.—See to the same effect Benedict's Admiralty, sec. 560; *The Globe*, 2 Blatch., 427; *The Adele*, 1 Ben., 309. Of course the judge in the above case only passed upon claims otherwise equal in dignity. For instance, he did not mean to disturb the rule (approved by himself in *The Omer*, 2 Hughes, 96,) that the last supplies furnished are prior in dignity. The supplies in the above case were furnished concurrently; and it was only in reference to that state of facts that the judge was speaking.]

United States District Court, Eastern District of Virginia.
At Norfolk, December 27, 1881.

THE MARY STEWART.

* An injury done to a man, whilst he is standing on a wharf, by a bale of cotton which is being hoisted aboard a ship loading at the wharf but which falls before it reaches the ship's rail, and strikes him, is not cognizable in the admiralty.

Nor can jurisdiction over such a tort be given by a state statute.

Under the contract between the ship and the charterers the latter are to employ and pay for the stevedoring, and the ship is to furnish the tackle and falls by which the loading is to be done. Under this contract the ship furnishes a rope, which breaks after a short use of it by the stevedores, and one of the employes of the stevedore is injured by the falling of a cotton bale. *Held*, that there was no privity between him and the ship, he not being a party to nor interested in the contract of charter-party, nor any violation of any duty towards him; and that consequently he could not maintain an action against the ship or her owners.

IN ADMIRALTY.

In June, 1881, the ship *Mary Stewart* was chartered by Reynolds Bros. of Norfolk, to load with cotton. By the charter-party Reynolds Bros. agreed to furnish and pay for the stevedoring, and the ship agreed to furnish the tackle necessary for loading. The officers of the ship had no control over the manner in which the stevedoring was carried on,

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but the ship was entirely under the control of the stevedores while loading. The ship furnished a three-inch rope. One end of this rope was fastened to an engine which stood on the wharf and furnished the hoisting power. The rope was then passed through a pulley attached to one of the masts of the ship, and the other end was fastened to the cotton which was being hoisted aboard. After the rope had been used a short time, it broke near the engine, and one of the bales of cotton which was being hoisted fell, and seriously injured the libellant, W. A. Segar, who was one of the employes of the stevedore. He was standing at the time on that part of the wharf which is called the apron, and which projects out over the water, resting on piles driven into the water and attached to that portion which is cribbed and filled in. He thereupon libelled the ship. The accident happened at the wharf of Reynolds Bros., in Norfolk. It seems that the rope was a good one, but that it should have been used with a double tackle in the handling of cotton bales; whereas it was used in this case with a single tackle.

Burroughs & Bro. and E. Spalding, for libellant.

Sharp & Hughes, for the ship.

HUGHES, D. J. It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of tort the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land it is not cognizable in the admiralty, even though it may have originated on the water. *The Plymouth*, 8 Wall., 20. This springs from the well-known principle, that there are two essential ingredients to a cause of action, viz., a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage, the other necessary ingredient, must also happen on water.

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Now, the injury in the case at bar happened on the land. Wharves and bridges are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached. And this is the case whether they project over the water or not. Injuries done to or on them, therefore, are not cognizable in the admiralty. *The Rock Island Bridge*, 6 Wall., 213; *The Neil Cochran*, 1 Brown Adm., 162; *The Ottawa*, Id., 356.

Not being cognizable in the admiralty, such injuries can not be made so by the state statute. Such a statute can not of itself confer jurisdiction on the admiralty courts. The various state statutes attempting this have no effect of themselves, but are operative only because to a limited extent they have been adopted by the 12th rule in admiralty of the United States supreme court. And the only effect, even of that rule, is to annex the additional right of a proceeding *in rem* to a contract already maritime in nature. *The Pacific*, ante p. 258.

As the libel must be dismissed for want of jurisdiction, I might well refrain from passing on the other questions discussed. But inasmuch as the question of privity has been elaborately argued, I will pass upon that also.

The libellant was not employed by the ship, but by Mr. Donald, the stevedore. He was not a party to the contract between the ship and the charterer. It is well settled that where a party is delinquent in a duty imposed by contract, no one but a party to the contract can maintain an action. It is only where a party neglects a duty imposed by law, in other words, a duty to the public, that an action will lie on the part of any one injured thereby, irrespective of privity. That is, if the injury complained of arose from the neglect of a public duty, any one injured may maintain an action, and the mere fact that there is a contract between one of the parties and a third person will not defeat the action. Now it can hardly be argued that furnishing a proper rope is a duty imposed by law. It is a duty imposed by charter-party alone, a duty due to the charterer alone, and for vio-

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lation of which he alone can sue. It was not a duty to the public. Had the masts of the ship, for instance, been insecurely fastened, and fallen and injured any one, that would have been a violation of a public duty, a duty imposed by law on every one to have no dangerous structures on his property which may injure those who come on the premises by the invitation or permission of the owner. But a rope can hardly be called a dangerous structure. The injury in the case at bar arose not from the rope itself, but from its use. It should have been used with a double tackle. Its use with a single pulley was the act of the stevedore, not of the ship's master. The proximate cause of the accident, therefore, was the use of the rope by the stevedores, not the furnishing of the rope by the ship.

The cases of *The Kate Cann*, 2 Fed. Rep., 241, and *Coughtry v. Woolen Co.*, 56 N. Y., 124, quoted by counsel for libellant, do not militate against this view, but on the contrary sustain it. In the former the injury arose from the falling of some dunnage which had been insecurely fastened. The neglect to fasten it properly and safely was clearly a violation of a duty imposed by law. So, too, in the latter case, where the injury arose from the falling of a scaffold on the defendant's premises. Ample authority for the doctrine laid down above may be found in the following cases: *Alton v. Railway Co.*, 19 C. B. N. S., 213; *Tollit v. Sherstone*, 5 M. & W., 288; *Winterbottom v. Wright*, 10 M. & W., 112; *Colliss v. Selden*, L. R. 3 C. P., 496; *Playford v. Telegraph Co.*, L. R. 4 Q. B., 705.

* I will sign a decree dismissing the libel with costs.

[NOTE.—In *Heaven v. Pender*, 9 Q. B. D., 302, (decided since the above opinion was written,) the defendant supplied and erected a staging round a ship under a contract with the ship-owner. The plaintiff was employed by the ship-owner to paint the ship, and in the course of the work fell from the staging and was injured, by reason of a defect in its condition. In an action for damages, the court following in the line of the decisions above referred to, held

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that the defendant had no duty to the plaintiff to supply a reasonable safe staging, and therefore was not liable.]

*United States District Court, Eastern District of Virginia,
January 31, 1882.*

THE SANDRINGHAM.

- * 1. Where the testimony of the libellant and the ship's officers conflicts, and one of the officers of the ship is not examined on the points in dispute, that circumstance goes to the discredit of the ship's officers.
2. The testimony of experienced mariners, of approved credibility, as to the character of the weather, and the practical effect of the wind and ocean swell, or other such facts occurring at sea under their own observation, is a higher and more reliable grade of evidence than the weather reports of the signal service from observations taken on land, and will be preferred by the court in passing upon such facts.
3. The amount awarded as salvage comprises two elements, viz., adequate remuneration given by way of compensation according to the circumstances of each case; and bounty given to the salvor for the purpose of encouraging similar exertions in future cases. The relative amounts of each of these elements given depend on the special facts and merits of each case.
4. In addition to the six main ingredients of which a salvage service is composed, as announced in the case of *The Blackwall*, 10 Wall., 1, the court will take into view, as an important consideration, the degree of success achieved, and the proportions of value lost and saved; and will award a higher proportion, even on large values, in cases where both ship and cargo are saved with substantially slight injury, than in cases where only the ship or only the cargo, or only portions of it, are saved.
5. A ship on a voyage from Galveston to Liverpool was wrecked at the Virginia capes. Both ship and cargo were saved by salvors, and enabled to complete the voyage. One-half the gross freight to be earned on arriving at Liverpool was included by the court in estimating the value of the property saved.
6. A steamer worth, with her cargo and freight, \$200,000, was stranded on Cape Henry, within 100 yards of the shore, where the currents of the Chesapeake bay, encountering those of the ocean, are often very dangerous. Salvors, with a large force of vessels, wrecking apparatus, and men, after a week of hard and dangerous labor, in which the highest degree of skill was shown, succeeded in getting off both vessel and cargo so successfully as to allow them to proceed on their voyage after repairs to the ship. One-fourth of the combined value of the vessel and cargo, and of half the freight, was awarded as salvage.

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IN ADMIRALTY.

Sharp & Hughes, for libellants.

Walke & Old, for respondents.

HUGHES, D. J. On the evening of Friday, November 5, 1880, the iron steam-ship, Sandringham, of Glasgow, 1,159 tons, McKay, master, at about 7 P. M. was beached some three-quarters of a mile south of Cape Henry light-house. She was loaded with 3,000 bales of compressed cotton, and a complement of flour and manganese. She had cleared at Galveston, and was bound for Liverpool. She had first struck on the outer reef or sand-bar which stretches along, and parallel with, and about 300 yards distant from, the shore; but, passing over that, she then struck the main shore at a point some 50 or 75 yards out from low-water mark, where she stranded in the sand and was unable to get off. There was at the time a heavy fog, but the light of Cape Henry could be seen, and had been seen at intervals previously to the stranding of the ship. Capt. McKay says that "the grounding was occasioned because of a heavy fog, a heavy swell of the ocean from the eastward, and because there was no pilot on board, and he himself was ignorant of the nature of the coast."

At 7:40 P. M. life-boats from the government's life-saving station at Cape Henry came along-side and the captain went on shore. The ship was then striking heavily at intervals against the ground, and continued to do so during the night and nearly all of next day. After coming ashore the captain telegraphed to Norfolk for assistance. The ship was taking water all night, and the pumps were kept going and the hold-sluice left open. Some time after midnight on Saturday morning, the 6th, the ship was still striking heavily upon the ground, making water, and lying upon her star-board bilge. A heavy swell was running in and breaking over her forepart. At 4 A. M. she lay quiet, but her pumps were kept constantly going. At 7 A. M. she began to strike

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and strain heavily aft. At noon the captain returned from the shore in a life boat. At 2 P. M. he received a telegram from the life-saving station announcing that a storm was threatened, and advising him to land his crew and their personal effects. After 4 P. M. the crew were, in the course of time, all landed; the chronometer also was sent ashore; but the master, first mate, and engineer remained aboard a while longer. At 6 P. M., or about that time, the wrecking officer and wrecking gang of the libellant came on board and took charge of the ship. After the ship's crew had gone ashore the captain asked the wrecking officer on board (Capt. Nelson) whether the wrecking surf-boats were sufficient to save himself and officers as well as the wrecking gang, and was answered in the negative; the reason assigned being that the surf-boats were only of size sufficient for the wrecking men. The ship's engineer, Watson, who had banked his fires and locked his engine-room, also inquired of Capt. Nelson whether, if anything happened from the storm during the night, he himself could be taken in the surf-boats, and received a like answer in the negative.¹ Thereupon Capt. McKay, Watson, and the first officer went ashore on the rocket apparatus of the life-saving station.

Capt. McKay testifies that he left his nautical instruments, books, charts, and the clothing of himself, the engineer and others on board.

Most of the foregoing facts are taken from the log-book of the Sandringham, and from the depositions of her officers given in this cause.

When the master first went ashore, on the night of the fifth of November, he telegraphed to the house of William Lamb & Co., at Norfolk, asking for assistance, and requesting the firm to make the best arrangement practicable for saving the vessel and cargo.

Except at Norfolk no assistance was available short of Baltimore or the Delaware, and the weather, fog, and distances were such that efficient aid with sufficiently pow-

¹ Capt. Nelson testifies that his answer was that he could not take the baggage, but he would take the officers.

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erful steam-tugs could not from these quarters have been procured by any possibility, within 24 hours. Indeed, it is not shown by the evidence that any adequately constituted equipped, and furnished wrecking fleet existed at all south of New York, except that of the libellant.

I think it is absolutely shown that if the saving of this ship and cargo could have only been effected by a wrecking fleet of stout steamers, tugs, schooners, and surf-boats, completely manned and equipped, that of the libellant was the only fleet available at the time for this enterprise, or existing at all on the south Atlantic sea-board. Accordingly, the Messrs. Lamb & Co., at once engaged with the libellant for this salvage service. Capt. McKay says in his deposition :

“Having received a telegram from Lamb & Co. to the effect that the arrangement of salvage was left to arbitration, on meeting those captains (Capts. Nelson and Orrin Baker, of the wrecking fleet, at about 11 A. M. on the 6th) I mentioned that circumstance to them, and told them to commence operations at once on that understanding.”

The testimony in the case proves that what the captain says about “arbitration” was not true. All the witnesses of the libellant who testified on the subject concur in stating that nothing was said about abitration, and the claimant does not adduce a single witness to corroborate Capt. McKay’s assertion. The simple fact was that a salvage service was undertaken, without any contract or definite understanding as to the compensation or the mode of ascertaining the amount of it.

The libellant, Capt. Joseph Baker, on being called upon by Col. William Lamb, the head of the firm of Lamb & Co., at once began preparations for the relief of the stranded ship; and the steam-tug Nettie, Capt. Cole, with large anchors and cable, with an outfit of other wrecking apparatus on board set out from Norfolk for Cape Henry about midnight of the 5th. Owing to the heavy fog she did not pass Fortress Monroe (13 miles from Norfolk) till daylight of Saturday, the 6th. When abreast of the fortress she met

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the wrecking steamer B. & J. Baker, also belonging to the libellant, Capt. Orrin Baker, master, which was on her return from another wrecking enterprise, having on board a considerable outfit of wrecking material, including a very large anchor of 4,500 pounds weight. It had also on board a wrecking gang under Capt. Nelson. The Baker at once joined the Nettie, and both proceeded to the vicinity of the Sandringham, which lay about 17 miles from Fortress Monroe and 30 miles from Norfolk. Between the hours of 10 and 11 A. M. of Saturday, the 6th, they arrived near the steamship, and Capts. Nelson and Orrin Baker went aboard her. After making slight examination they went ashore, where they saw Capt. McKay, and were directed by him to go to work and save the ship; no terms being mentioned in the interview. They at once thereupon returned to the wrecking steamers, and proceeded to lay their two largest anchors some distance beyond the outer reef, planting one anchor out beyond the other, and connecting the two by a chain. To the inner anchor they attached their cable, and then laid the cable to the Sandringham. The distances were nearly as follows: From low-water mark on shore to the ship, between 50 and 75 yards; from the ship to the outer reef and line of breakers, about 150 yards; the breakers were about 100 to 150 yards wide; the two anchors were well out beyond the outer line of breakers.

During the wrecking operations the wrecking steamer B. & J. Baker lay for the most of the time about 1,000 yards beyond the ship; other wrecking vessels 150 yards and more beyond the breakers. Having planted the anchors beyond the outer reef and breakers, Capt. Nelson, who had charge of the wrecking gang which was to operate on board the Sandringham, came along-side of the ship in a surf-boat, with his cable, at about 4 P. M., and called to those on board for a line with which to haul his cable on deck; but none was thrown him. He thereupon climbed on board and found the crew preparing to go ashore with their baggage. On being asked by the second mate if he intended to take charge, he answered yes, and asked for help

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to haul the cable up. The second mate replied that they had all stopped work and were going ashore.

By failure to receive the prompt assistance he had counted on, Nelson's line got fouled with the propeller of the ship. This accident made it necessary to return outside for a grappling hook with which to fish up the cable, which he succeeded in doing, and in getting his cable aboard the ship by about 6 P. M. There was much wind and swell. The crew, as before stated, had then left the ship, and were followed shortly afterwards by the officers, who left their ship by the rocket line of the life-saving station for personal safety from a coming storm.

The log-book of the Sandringham, speaking of the sixth of November says:

"After the wrecking crew came aboard, the ship driving up the beach all the time. Six P. M., set cables tight (meaning the wreckers' anchor cables.) Master and myself went ashore on the rocket apparatus. Weather looking bad and storm signal flying on the life-boat station. A strong breeze from the south-east with a heavy swell running in."

The Sandringham then lay at an angle of about 45 deg. with the beach, heading northerly, with her port side to land. She lay upon a beach of fine movable sand, which would be rapidly cut out from under the ship by the strong currents and heavy ocean swells which run more or less continually at Cape Henry. She now careened considerably on her starboard side, in consequence of the strong current from the eastward which had been running since she stranded.

She was a propeller, and an iron-compartment ship, with five compartments; and she had a ballast tank in her hold of 100 tons capacity, which was then filled with water. She had a visible leakage around her stern gland, and had taken in several feet of water aft, which the pumps, though kept active, did not effectively reduce. The testimony of the libellant is that there was as much as six or seven feet of water in the hold when the wrecking officers, Cpts.

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Nelson and Orrin Baker, first came to the ship about 11 A. M. on the 6th. Just previously to seeing her master on shore, they, in company with the first mate of the Sandringham, proceeded to ascertain the extent of the leakage below, and found that the water was from six to seven feet deep in the shaft-alley and engine-room, and all the way from the bulk-head aft; with the rear compartment leaking near the stern post. The defense did not call the first mate to contradict this statement. There was no diminution of water between 11 A. M. and 6 P. M. on that day.

When the wreckers first took charge, at 6 P. M. of the 6th, the ship had sunk about seven feet in the sand, though some of the ship's crew insist in their testimony that the depth was not more than four feet. In either case, the sequel showed that it was wholly beyond the power of steam-tugs, in any number, and of any capacity, to draw the ship off the beach as she lay at the hour last named, and no expedient was left for saving her except to lighten her of part of her cargo, to pump out the ballast tank, to reduce the amount of water in her hold, and to gradually draw her out of the sand by heaving upon the cable attached to anchors planted out in the main, whenever the tide favored. With all their exertions they did not actually move the ship for five days. When the officers and crew of the Sandringham left their ship on the evening of the sixth of November, as has been stated, her master had himself despaired of being able, with the ship's crew and instrumentalities, to save her. Although he had cables, anchors, and boats for planting them, he did not attempt at any time on the 6th to save his ship by the means which the wreckers employed afterwards with success. He states that the weather and the ocean swells were too severe for this. Whether or not at the time of leaving the vessel on the rocket apparatus of the life-savers, on the evening of the 6th, the master and his officers had any expectation or intention of returning at all, does not conclusively appear. It is certain that the master on that night, seeking personal safety on land, abandoned the ship in the face of danger

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absolutely to the wreckers, and did not offer or attempt to resume authority over her until after she had been safely brought into harbor a week afterwards.

The ship, having survived the severe weather of the night of the 6th, and the weather and the sea having considerably abated by next day, Capt. McKay and his crew returned to the ship on the 7th, and resumed the occupancy of their respective quarters on board. But they gave no assistance in the wrecking operations at any stage of them, except that the engineer and firemen worked the ship's donkey-engine and winches in heaving upon the cable; and this, although the wrecking enterprise went on laboriously from the night of the 6th to the night of the 18th, when the ship was brought into harbor.

There is some contradiction in the evidence as to whether or not the bed on which the ship lay after she was beached was a *quicksand*. Admiral Smyth, in his Dictionary of Nautical Terms, defines this to be "a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom." It is immaterial what name we apply to the sand off Cape Henry. The fact is that there, and all along the coast southward for several hundred miles, the sand is a fine, movable substance, which, when a heavy body is resting upon it, retreats from under it by the action of the currents of the ocean which there constantly prevail, leaving a bed into which the body sinks deeper and deeper the longer it remains in the position. There is no possibility of any substance, which, in specific gravity is too heavy to float upon the surface of the water, being lifted out of its bed in this sand and floated upon the shore. All the vessels that are beached upon the sands of this long coast invariably continue to sink, deeper and deeper, until they disappear from sight under the sea into the sand.

The fate of the United States steam-ship Huron, wrecked off Kitty Hawk, November 27, 1876, was a notable historical exemplification of this characteristic of the sands of this part of the coast.

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When the wreckers took charge of the ship at 6 P. M. on the evening of the 6th, and with their cable took hold of her aft, and began to heave upon the cable attached to the anchors planted outside the breakers, they checked the wallowing and sinking process; but the ship had been there nearly 24 hours on the beach, and had already sunk some seven feet into the sand. The wrecking company consisted of the libellant, who remained in Norfolk to forward promptly whatever might be needed at the wreck; Capt. Stoddard, who had the general direction of the wrecking operations, and who remained most of the time on the B. & J. Baker; Capt. Nelson, who had charge of the work on board the Sandringham; Capt. Orrin Baker, master of the wrecking steamer B. & J. Baker; Capt. Oakley, of the steam-tug Mollie Wentz; and 80 or more other persons, composing the crews of the several vessels employed, and embracing the wrecking hands, a gang of about 30 of whom operated on the ship. Besides the vessels already named, the tugs Spring Garden and G. W. Roper, the wrecking schooners Henrietta, Joseph Allen, and Annie Clark, three surf-boats, and the lighter Neptune, were engaged in the enterprise.

The plan of operations was to heave on the cable and take advantage of every tide to draw the ship off the sand-beach; to lighten her by taking off cotton, and shipping the bales on tugs and schooners to Norfolk; to keep down the leakage by active pumping; and to pump out the great weight of water in the ballast tank.

There were rough weather and strong ocean swells during four or five of the several days during which the work was going on, which made it necessary to pass the cotton from the deck over the port side of the ship, which was considerably *listed* upon her starboard side, to let it down into surf-boats run under her port side, and to carry it in these surf-boats across the breakers to the steamers and schooners outside. The weather and swell of the ocean were such during these days that these steamers and schooners could not come inside of the breakers without great danger.

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The work was the more tedious because it could not go on at night. Capt. Nelson says in his testimony:

“There was a line of breakers outside of where the ship was lying, from 100 to 150 yards wide, where it is dangerous to cross during the day; therefore I wouldn’t undertake to do such things at night. I was satisfied the [surf] boats would swamp if I did undertake it, and therefore I wouldn’t run the risk of losing boats and men’s lives. We couldn’t work on the ship [at night] for the reason we couldn’t see how to work in lowering cargo into the boats, and couldn’t have lights in the hold of the ship loaded with cotton.”

The weather was at times such that the vessels receiving cotton from the surf-boats found it necessary to put into Lynnhaven bay at night. The surf-boats were pulled out across the breakers by their crews taking hold of a lead-line that was stretched from the ship to the vessel receiving the cotton outside. Occasionally they were rowed out when the weather would permit. The surf-boats were rowed back by their crews, and were towed, on one day by a tug, out to the windward from the receiving vessels, in order to give them a fair wind to return to the Sandringham by rowing. Owing to the danger attending the lifting of the bales over the port side of the ship and letting them down into the open boats tossed on the waves below, and the small number of bales that could be carried in each boat, the process of saving the cotton was slow and tedious; but there were saved in this manner on the seventh, eighth, ninth, and eleventh of November an aggregate of 573 bales.

It was fortunate for the ship that the wreckers succeeded in making fast their cable to her aft part before night on the 6th, the night of the first storm which she encountered on the beach. By keeping a taut cable that night by means of the capstan and rope and pullies, they probably saved her from sinking hopelessly into the sand. By continuing to heave upon the cable afterwards, they gradually, after a few days, brought her stern around until she had attained a position approximately at right angles with the shore, across the course of the currents that run along the beach.

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When their hawser was first made fast, the ship was lying within 75 yards of low-water mark, and 150 yards inside the outer reef, and of the line of breakers 100 to 150 yards wide beyond.

On Saturday, the 6th, and every day afterwards until Friday, the 12th, the sea was too rough for any of the wrecking steamers or schooners to come along-side of the Sandringham; either because of rough weather or of the ocean swells that prevailed. Up to the night of the tenth of November no success had attended the efforts of the wreckers to pull the ship from her position on the beach. On that night she encountered a second storm, a heavy wind and sea striking her from the south-east at 11 P. M. In consequence of the current then cutting the sand from under her port side, she took a considerable list towards the shore, and was in danger throughout the night of going over on her beam ends. The wreckers had to apply themselves with great energy and determination to the task of breaking up the cotton between decks, and moving it from the lower or port to the starboard side of the ship, in order to keep her from capsizing. By dint of hard work, continued through most of the night, they succeeded in sufficiently righting the ship to save her from the danger of capsizing. The weather had been more or less rough all day on the 10th, so that no cotton could be taken out of the ship even in surf-boats. On the 11th it had sufficiently moderated to admit of the resumption of operation with the surf-boats. On the 12th the sea was smooth enough for the wrecking schooners and steamers to come along-side the ship, so that on that day as many as 476 bales were put off, or nearly as many as had been saved in the whole period of five days preceding in surf-boats.

By the night of the 12th the whole quantity of cotton which had been removed was 1,049 bales, which, the leakage having been stopped and the ballast tank having been emptied, so lightened the ship as to give strong hope of getting her afloat. The 1,049 bales of cotton which were removed from the ship were all taken either from the upper

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deck or from between-decks. It is not true, as the second mate of the ship testified, that 1,000 bales were taken from the lower hold. It is true that something less than 50 bales were taken from the hold for the purpose of making room for a pump that was intended to be put in there by the wreckers; but some of these bales were put back, and only the rest sent off the ship. The cause of the *listing* of the ship on the night of the 10th, from the starboard to the port side, was not the removal of 1,000 bales of cotton from the hold to the deck, as the second mate testified, but was the change of the current, which then cut the sand from under the port bilge of the ship, instead of the starboard bilge, as it had previously done. The ship was first got out from her original position on the 11th, when she was moved about 30 feet. On the 12th she was moved 10 feet, and on the morning of the 13th, 50 feet.¹ It has already been stated that this was done by heaving on the cable with the ship's winches, worked by the ship's engines, engineer, and firemen, under the direction of Capt. Nelson. About 8 P. M. on the 13th the ship was finally got afloat, and was pulled out into deep water beyond the breakers by a tow from the steamer B. & J. Baker, aided by her own engines, which had been fired up. Her tow line was then cast off, and she steamed into Norfolk harbor under the command of Capt. Stoddard, arriving there about midnight.

It was fortunate that she was got afloat just when she was, for she thereby escaped by half an hour a heavy wind and swell from north-eastwardly that then set in; that particular swell lasting several days after the wind had sunk to four miles an hour.

In the saving of the Sandringham and her cargo there was no lack at any stage of the undertaking of men or vessels or material in any particular, and the enterprise was thoroughly successful; the ship having been brought safely into port so little injured that she soon afterwards steamed

¹These figures are taken from the log-book, which is not evidence against the libellant. I suppose they are a slip of the pen, and that *yards* or *fathoms* were intended. Libellant's witnesses make the distances greater than if the log-book meant feet.

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off to Baltimore for repairs, and not a bale of cotton having been lost.

So unusual and unexampled was the success of this enterprise that it naturally suggests the question whether the fortunate result was owing to the skill of the men in charge, or to the mildness of the weather, the moderation of the sea, and the absence of risk and danger in the wrecking operations.

In regard to the first question, it may be safely stated that the wrecking officers who conducted this enterprise were men of extraordinary skill and experience in the business of wrecking; and that they were furnished on this occasion liberally and promptly with every appliance that was requisite for this work. The libellant is a wrecker by profession and of a life-time's experience. He had at command at the time of the salvage under consideration, as the creation of a heavy outlay of capital, estimated by some of the witnesses in this cause at as much as \$100,000, a complete outfit of wrecking vessels, implements, and material.

Per contra, it is shown by an inventory of the prices at which these various articles were valued to the Baker Wrecking Company, on a recent occasion, that the aggregate proceeds of sale of the larger part of them was only \$25,575. The libellant contends, however, that the lowness of these prices was owing to the absence of competition for such property, in consequence of the general discontinuance of the wrecking business that has taken place on the Atlantic seaboard, from which cause the prices were but nominal, and far below the original cost of the articles inventoried. He contends, also, that this sort of property is peculiarly liable to waste, deterioration, and loss; and always sells, at second hand, at great sacrifice. Be this as it may, the fact remains that the libellant's assortment and outfit of wrecking vessels, apparatus, implements, appliances, and supplies of all kinds was very large.

Capt. Baker had been long at the head of the principal wrecking company of the Atlantic seaboard; is reputed

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one of the most experienced and successful wreckers of his day; and his establishment was, at the time of this service, the only one south of New York that had survived the evil fortunes that have for a long period beset the wrecking business on this coast. The earnings of his firm in a period of 10 years had amounted to the aggregate sum of \$811,425; and his outlays during this period were \$700,000; to which must be added the loss and depreciation of stock in the wrecking business. Capt. Stoddard had been a partner, but was not so in November, 1880, and engaged in this special enterprise on a special agreement. His compensation was only \$10 a day; but the libellant was in debt to him, and he hoped to make his debt good.

By reputation Capt. Stoddard is probably the best wrecker on the southern Atlantic coast. He has followed the sea the greater part of his life, and has been engaged in the business of wrecking, as a profession, for many years. He has had more experience in the business than any man on this coast, except Capt. Baker, and is still in the vigor of manhood.

Capt. Nelson, Capt. Cole, and Capt. Orrin Baker are also wreckers of many years' practical experience, and of the highest repute in the profession. These are all men of high personal character, and good standing as members of society. They operate as wreckers along the whole Atlantic coast of the United States south of New York, and are sent for from far and near.

The crews of the wrecking vessels were employed by the year. This insured familiarity with their duties, but did not insure the extraordinary exertion which is inspired by the lively expectation of the extraordinary rewards of salvage services. It is quite probable, as is contended by the defense, that some of the working gang who were employed in this enterprise were of the class of common laborers, who were without special experience in the wrecking business, and were paid but ordinary wages. Yet, on the whole, the evidence in this case establishes the conviction that if success in a wrecking enterprise could be insured by large

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experience, approved skill, and perfect appointments, this particular enterprise had the benefit of all these conditions of assured success in a high degree.

On the question whether the weather and sea were such as to render the service of the wreckers in this enterprise one of risk, danger, and difficulty, there is some contradiction in the evidence in the case.

There was undoubtedly a storm on the night of the 6th which put the ship in great peril, and which would in all probability have caused her to bilge and break up, and possibly to have sunk in the sand hopelessly beyond recovery, but for the wreckers having planted their anchors and made fast their cable to her on the afternoon before. There was undoubtedly another storm on the night of the 10th, which, by the changed action of the current upon the sand-bed under her, nearly capsized the ship; and would have done so, but for the hard work performed by the wreckers on board in breaking up the cotton between-decks and shifting it from the lower to the upper side of the careened vessel. On both occasions the ship was in great danger and peril, and was rescued from them by the exertions of the wreckers. The surf-boating of the cotton was undoubtedly rendered necessary, during the intervals between the storms, by the rugged condition both of the weather and the sea.

Though denied by McKay, the engineer Watson, and second mate, it must have been true that there was no time between the night of the 6th and the morning of the 12th in which the wrecking vessels could safely have come inside of the breakers, and lain alongside of the ship and taken cotton from her. The same condition of the weather and sea made the process of delivering the bales of cotton from the listed ship into the surf-boats, and conveying them many hundred yards across a wide line of breakers, a work of danger, both to life and to property, requiring for its avoidance much skill and care. It is difficult to read the whole evidence in this case and then to question these facts as to the two storms, and as to the work of the surf-boats.

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Three of the witnesses for the ship discredit their own testimony by statements signally untrue, and I have no choice but to reject it when it is in conflict with the evidence of the wrecking officers; and their testimony is the more open to distrust from the fact that the first mate of the ship was not examined on the principal points in dispute.

Although the reports of the weather and sea-swells made at the signal office at Cape Henry do not show during the whole period of this service as bad a condition of weather and sea as was testified to by the wrecking officers, still it is probable that this partial conflict of testimony is more apparent than real. On that part of the coast the wind and sea-swells are not necessarily simultaneous. It is well known that often there are high winds without much swell, and, on the other hand, heavy swells in fine weather. That the reports from the signal station at Cape Henry, put in evidence by the defense, do not in some respects correspond with the testimony of mariners, speaking from their personal experience, is doubtless owing partly to the fact that the observations at the signal station are made only seven times in 24 hours, at a point on the coast where the changes of wind and current are frequent and sudden; partly to the fact that they are made by theoretical men on shore, whose position is essentially different from that of practical seamen actually encountering the elements out upon the waters; and partly to the fact that the nomenclature of the signal service, which is purely scientific and arbitrary, differs from that of seamen, which is conventional.

For instance, the men of the signal station say that the wind is not "high" until it blows at the rate of 35 miles an hour; is not a "gale" until it attains a velocity of 45 miles; and does not become a "storm" until it exceeds the rate of 50 miles an hour. Mariners, however, who buffet the winds, use a nomenclature which refers to sensible effects rather than to mathematical precision, and to velocities apparently as great but often much less than are indicated by scientific instruments. There is accordingly

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observable, in some of the testimony taken in this case, a discrepancy between scientific reports of winds and swells at Cape Henry, made from instrumental observations taken on shore, and the statements of seamen who were engaged in the vessels and surf-boats outside. And, as I am under the necessity of passing upon the relative value of this testimony, I am free to say that I am not inclined to repose entire confidence in the reports of the officers of the signal service as to facts out at sea, when they conflict with testimony of experienced and credible seamen. Indeed, these reports cannot be received between parties to a litigation as evidence in the strict legal sense. They lack the two sanctions necessary to the validity of legal testimony, viz., that of being given on oath, and that of being subjected to the opportunity of cross-examination.

The courts are doubtless at liberty to take judicial notice of these reports as historical minutes of the course of natural events; but they certainly are not bound, and perhaps not at liberty, to give full credence to them in prejudice to the interests of litigants, when contradicted by the testimony of practical mariners of unquestioned credibility. The depositions of experienced mariners as to events of which they have practical knowledge, given on oath and under cross-examination, is certainly a higher grade of evidence than such reports; and where the witnesses are well known and enjoy a character beyond impeachment, it must be preferred. No doubt, the scientific reports are true, mathematically, as of the isolated points of time and place to which they refer; yet all naked mathematical facts occurring in the course of nature are more or less modified by circumstances which do not appear in the barren scientific minutes which record their occurrence. If a surf-boat crossing dangerous breakers in a high wind on a sea-swell is suddenly caught up and capsized, the property on board lost, and the men drowned, the collision of elements which actually did occur, and did produce the catastrophe, may not be denied to have occurred on the faith of a minute taken an hour or two before or afterwards, at the nearest

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signal station on shore, showing that the wind was at the time not blowing a "gale," but only at the rate of 44 miles an hour, and that the swell was "light south-east."

A swell that is light along the shore may produce angry, roaring, engulfing breakers out on a reef but a few hundred yards off. If the witness to nautical facts be an intelligent person of experience and approved credibility, a court of law must believe what he says under oath and under cross-examination, concerning facts which have occurred within his own knowledge, in preference to the isolated minutes of an officer who was not on oath and was not cross-examined as to any of the explanatory circumstances which may have existed at the time. Yet I am free to admit that these minutes often afford to a court invaluable assistance in correcting extravagances of statement on the part of ignorant and unscrupulous witnesses.

The values agreed upon for the property saved are :

For the ship valued in Baltimore,	-	\$ 86,000
For the cargo,	- - - - -	150,000
For the freight from Galveston to Liverpool,		14,000
		<hr/>
		\$200,000

After the ship was valued repairs were put upon her which cost \$13,677.59.

THE LEGAL FEATURES OF THE CASE.

To the case whose leading facts have thus been recited I am now to apply the principles of the law of salvage, and ascertain by their guidance the amount of money to be awarded for the successful service which has been described. Although it is true that this amount lies within the discretion of the judge, yet he is not at liberty to render an arbitrary judgment at his own individual discretion or caprice.—a *rusticum judicium*,—but must be governed in his award by the teachings of precedents and the recognized

principles of the law of salvage. That this is a case of salvage—that is to say, a case of *bounty* as well as *wages*—is conceded by the respondent, who admits that *one-tenth* of the value saved would not be an undue compensation. The libellant claims *half*, and my own duty is simply that of determining the amount of compensation to be awarded. Being a case of salvage, it is not one of mere wages, *pro opere et labore*, nor a case of *quantum meruit*, in the sense that the work is to be paid for in an amount ascertained by applying the ordinary rules of remuneration for personal services: but it is a salvage claim for services which could not have been compensated at all except in the event of success, and which not only embraces *wages* for the work and labor done, and *adequate remuneration* for outlays of time, labor, and means according to their actual value, but also embraces a *reward* for having rescued property from the perils of the sea, under circumstances of risk and danger to the salvor and his property, and in the face of the contingency of getting nothing at all in the event of failure; a *reward* so liberal as not only to satisfy such reasonable expectations of extraordinary compensation as prompted this particular adventure, but also to serve as an inducement to like exertion by salvors in future cases of peril and doubtful success.

Chief Justice Marshall alluded instructively to the policy of the law of salvage in the case of *The Blaireau*, 2 Cranch, 266, in the following terms:

“If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life, by the salvor,—no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea; yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice. If we search for the motives pro-

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ducing this apparent prodigality in rewarding services rendered at sea, we shall find them in a liberal and enlarged policy. The allowance of a very ample compensation for these services, one very much exceeding the mere risk encountered and labor employed in effecting them, is intended as an inducement to render them, which it is for the public interests, and for the general interests of humanity to hold forth to those who navigate the ocean."

In the case of *The Henry Eubank*, 1 Sumn., 400, Judge Story gave expression to similar views:

"The law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It is a more enlarged policy and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature; and it bestows upon the owner a liberal bounty to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions which should interdict his master from salvage service. * * * The law offers not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast."

Of course this liberal policy of the courts thus announced must not be abused to the extent of encouraging or ministering to a spirit of avarice and greed. Another American jurist of the early part of our century, Judge Hopkinson, in the case of *The Elvira*, Gilpin, 60, says that to a just and fair remuneration for the labor, hazard, and expense which a salvor has encountered—

"The court, governed by a liberal policy, will add a reasonable encouragement, which the generous and humane will hardly need, to prompt men to exertions to relieve their fellow-men in danger and distress. But we must remember that the policy of the law is not to provoke or satisfy the appetite of avarice, but to hold out an inducement to such as require it, to make extraordinary efforts to save those who may be encompassed by perils beyond their own strength to subdue."

Salvage, therefore, is a reward or bounty, exceeding the

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actual value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods have been saved from shipwreck or other dangers of the sea. 1 Bell, Com., 492. How to give such recompense as may fairly reward the labor, intrepidity, and perseverance of salvors, and encourage them to exertion and honesty in relieving ships, goods, and persons in danger, and at the same time to prevent excessive exactions in the moment of alarm, is a difficult problem; and a court must deal with each case before it according to its own particular circumstances, and with reference to the liberal aims of the law as explained by the jurists whose expressions have been quoted. It may be laid down as a cardinal principle of salvage that the rate of compensation to be allowed in any case must not only contemplate the labor and exertion and danger attending the particular enterprise, but must be so liberal, if the condition of the fund at disposal permit, as to attract public attention; the court looking not merely to the exact *quantum* of service performed and its actual value, but to the general interests of navigation and commerce, which depend for protection upon services of this character.

I have emphasized this latter feature of the policy of the law of salvage, because there is a growing complaint among wreckers and salvors that the admiralty courts of our Atlantic coast, more particularly those of New York, have until quite recently been disposed for a long time to ignore it in their awards of salvage, and to confine themselves too much to the *quantum meruit* view of the value of salvage services. Whether the policy of the courts has been too restricted or not in this respect is not for me to say; but the fact is, whether resulting from this or other causes, that almost every wrecking company which has operated along the Atlantic seaboard in the last 50 years has ceased to exist.

In this country we have no legislation having for its object the encouragement of salvors, like the merchants' shipping act of Great Britain, 17 & 18 Vict., c. 4, §§ 458 et

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seq.; and the duty of affording this encouragement devolves upon the admiralty courts; and I think it is generally conceded that unless these courts are more liberal in their awards of salvage than they were for a considerable period until recently, the business of wrecking as an organized pursuit, conducted by reputable men, will soon be wholly abandoned. Certainly, if it be the policy of the law and of humanity for the courts to encourage by liberal bounties the rendering of aid to persons and property in peril at sea, that encouragement ought not to be doled out so illiberally as to destroy all organized and reputable wrecking companies on our sea-board.

I do not propose in the case at bar, however, to make any violent departure from the policy of our American decisions. I think a more liberal policy has already been inaugurated in most of our courts, especially by the supreme court of the United States; its decisions in the cases of *The Camanche*, 8 Wall., 448, and *The Blackwall*, 10 Wall., 1, being conspicuous pioneers in the line of a liberal policy.

The recent cases in the English high court of admiralty of *The Hebe*, L. R. 4 Pro. Div., 217, and of *The Craigs*, L. R. 5 Pro. Div., 186, indicate a liberalized policy in England also.

The leading considerations to be observed in determining the proportion or amount of an award for salvage service are well defined. I do not know where they are more explicitly stated than in the instructions given in 1865 by the British board of trade to the receivers of wrecks of Great Britain. Embodying the result of the decisions of the English and American courts of admiralty, the board of trade then laid them down as follows. We are to consider:

(1) The degree of danger from which the lives or property are rescued.

(2) The value of the property saved.

(3) The risk incurred by the salvors.

(4) The value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed.

(5) The skill shown in rendering the service.

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(6) The time and labor occupied.

These are the ingredients which must enter, each to a greater or less degree, as a *sine qua non* into every true salvage service; and to these I will add, not as an ingredient so much as a consideration to be taken into view:

(7) The degree of success achieved, and the proportions of value lost and saved.

Employing the language of well-settled law, the board, in the same instructions, among other things, says:

"In estimating the degree of danger regard should be had to the damage sustained by the vessel itself, the nature of the locality from which she was rescued, the season of the year when the services were rendered, and, if the weather at the time was not tempestuous, the probability of its becoming so, and the ignorance or knowledge, as the case may be, of the master or other person on board the vessel."

With these points in view, I will comment briefly upon the case of the Sandringham.

1. That the ship was in imminent danger, at several periods of the work of saving her, is perfectly plain. Her master, Capt. McKay, had utterly despaired of saving her himself. She had beached at 5 P. M. on the fifth of November. He had left her two hours afterwards to call for help, and did not return until 12 M. the next day. During the early morning of the 6th, when it may have been practicable for him to lay his anchors outside by using the ship's boats, and to have taken measures for pulling her off the beach with a cable, as was actually done in the sequel, he failed to make the effort, and did nothing during the 24 hours after the ship had beached, even to prevent her from thumping against the ground. In fact, he did nothing at all for 24 hours, for the help of the ship, except to keep the pumps going part of the time. It is abundantly proved that when the wreckers took charge, whatever might have been the case before, the ship was too deep in the sand, and had too much water in her hold and in the ballast tank, and too much avoirdupois of cargo on her decks, to be got off the beach by tugs or tows of any degree of power.

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There was no recourse but to plant anchors out beyond the breakers, to lay a cable to them from the ship, to lighten her of the burden upon her, and then to pull her off shore—none of which her own master and crew were capable of doing.

The result shows that this course had become indispensable at 6 P. M. on the 6th, when the wreckers took charge; for with all their extraordinary force of men, material, and machinery the wreckers were unable for five days of lightening the ship, and of constant heaving on the cable, to wrench the ship out from the dangerous sand-bed in which Capt. McKay left her; and, even on the fifth day, they succeeded in moving her, according to the log-book, only 30 feet.¹ That the condition of ship and cargo was hopeless without the aid of the wreckers, is shown by her master's failure to do anything for her relief for 24 hours after the beaching; by his earnest calls for help from Norfolk; and by leaving his ship with her crew to seek personal safety, apparently in despair of her, 24 hours after the beaching, without expressing any intention to return; indeed, it is self-confessed. The ship was in so great danger during the night after this abandonment, (the night of the 6th,) from the storm that came on, that it is not unreasonable to conclude that she would have bilged and broken up, so that it would have been necessary to have removed her cargo by gunpowder, if the wreckers, fortunately getting a hold on her with their cable at 6 P. M., had not stood manfully by her all through the night, holding her firm with their cable, made taut by means of the capstan, and by means of rope and tackle; for they were unable to use the ship's engines on the winches by reason that the ship's engineer had, banked his fires and locked the engine-room before going on shore. Moreover, the ship was not only in this immediate danger of hopeless wreck, but there was no help within reach, which would have been at all adequate to the emergency, except that

¹ See note on page 327, where it is conjectured that the second mate meant yards or fathoms when he wrote feet in the log-book.

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which was furnished with promptness and amplitude by this libellant.

The ship was again in equal danger on the night of the 10th, and was a second time saved by the stout efforts of these wreckers. Still again, on the 18th, when she had been finally got afloat by efforts exceptionally judicious, skilful, and successful, she escaped by less than an hour another storm more dangerous than either of the first two, which came on as she was entering Chesapeake bay, and which would have beached her a second time if she had remained but a little while longer outside. For it is not true, as some contend, that narrow escape from a subsequent storm by means of the forecast, skill, and expertness of salvors is not to be considered in cases of this character. See remarks of the courts, *passim*, in *The Earl of Eglinton*, Swabey, 8, and *The Birdie*, 7 Blatchf. at p. 240. See, also, 2 Parsons, Shipp. & Adm. 284, 285.

As to the question of derelict, it has no other connection with this case than as an incident of the danger in which the vessel was when the salvage service was undertaken. A vessel may be a derelict in the eye of the law, and as affecting the amount of the salvage reward, though it may not have been a derelict in fact. It has been held that if a master and crew leave their ship for the safety of their lives, a mere intention of sending a steamer after her does not take away from her the character of a legal derelict. *The Coromandel*, Swabey, 205. If a ship be abandoned by a master and crew, *sine spe recuperandi*, (without hope of recovering her by their own exertions,) which was the case as to the Sandringham and her cargo, it has been held to be a derelict in so far as the amount of the salvor's remuneration is concerned. *The Genessee*, 12 Jurist, 401; *The Columbia*, 3 Haggard, 428. But the question of derelict is no longer of much importance in cases where the amount of salvage claimed does not exceed half the value of the property saved.

2. The ship and her cargo having been in extreme peril, and been saved, the second consideration is as to the value of

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things saved. In this case the value of the cargo, \$150,000, was readily ascertained by the market price of cotton. The value of the ship was fixed at \$36,000 by the survey that was ordered soon after she was brought off the beach into port. In her then apparently dilapidated condition, and in the reasonable apprehension that she might have been strained by lying for a week on the beach, this valuation may have been much lower than was justified by subsequent developments. She was repaired at a cost of only \$14,000, which placed her value when in the hands of her owners, ready to set sail for Liverpool, at only \$50,000, which was probably not much more than half her real value. If the salvage is to be estimated by a percentage or proportion, it might be just for me to consider this state of the case in fixing the award; but as the valuation has been treated at the hearing as a thing agreed upon and not in dispute, I will consider the value of the ship to have been only \$36,000.

As to the freight, the saving of ship and entire cargo put the ship in condition to make good her contract of affreightment by completing her voyage, and earning the entire freight agreed upon. It has always been claimed, and with some reason, that in such a case as this the whole freight should be estimated in making up the aggregate value, part of which is to be awarded for salvage. I think, however, the weight of authority has settled that the freight to be considered is only such proportion as the distance at which the salvage service was rendered from the port of departure bears to the whole voyage. In the present case, the distance of Norfolk as between Galveston and Liverpool being about half way, the value of freight to be considered must be half of the whole, or \$7,000. *The Norma*, Lush., 124; *Jones*, Salvage, 91.

2. As to the risk incurred by the salvors in this case, though their labor was long-continued, it cannot be regarded as having involved extraordinary risk to men experienced in wrecking, and accustomed to the dangers of the sea. Risk to salvors is only of importance as affecting remuneration. It is not a necessary element in salvage, but only a

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circumstance to be considered as enhancing their reward, if the risk be great. Jones, *Salvage*, 4; *The Pericles*, B. & L., 80; *The Bomarsund*, Lush., 77. I do not think the risk to the persons of the salvors of the Sandringham and cargo, experienced seamen as they were, was great enough to materially enhance the award in this case.

4. The value of the property of the libellant which was employed in this enterprise is not shown with accuracy anywhere in the evidence in the case. The steamers, schooners, barges, boats, and some of the material that were employed are mentioned in the depositions; and there is scattered evidence indicating their approximate value. I judge from all that appears on the subject that the property sent to the rescue of this ship by the libellant must have been worth, certainly must have cost, at least \$50,000. This property, from the nature of the business in which it was used, was not insurable, and was necessarily put at hazard on a dangerous coast, in the stormy month of November, in a wrecking enterprise conducted among reefs and breakers, close to the land. These circumstances must in justice be brought into consideration in estimating the salvage to be awarded in this case.

5. Of the skill shown in this enterprise, occurring where it did and when it did, and occupying a full week, the highest proof is its complete success. Indeed, the fact that those wreckers accomplished their work so very thoroughly and successfully as they did, is used by the respondent as an argument that it could not have been laborious, difficult, or hazardous. But I think the evidence in the cause forbids such an inference. It shows that the task performed by these wreckers was exceptionally arduous, faithful, and meritorious; and in such a case, the court is forbidden by one of the fundamental maxims of the law of salvage to treat the complete success of the enterprise in any other light than as entitling to an enhancement of reward. To treat the fact of success as depreciating the merit of such an enterprise, would be to cut up by the roots the whole theory and policy of the law of salvage. Success is, indeed,

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not always the test of merit ; but yet nothing could be more subversive of all good policy in human affairs than the opposite doctrine, that it is a proof of demerit. Of course, the idea cannot be tolerated in the present case.

6. The time and labor occupied in this enterprise were extraordinary, and such as are shown by but few admiralty cases. There were half a dozen or more considerable vessels, several surf and other boats, and nearly 100 men engaged every day for a week ; and the work was done in rough weather, at a tempestuous season of the year, when it was necessarily attended by much exposure, both of property and person. It went on for a week. The wreckers were laboriously employed, not only in the day-time whenever the weather and sea would permit, but on one or two occasions in the night-time when the ship was in especial danger. This extraordinary length of time and extent of service must, in justice, enter prominently into consideration in determining the amount due this libellant.

I come now to consider the more general relations of this case to the law of salvage. It would be an unprofitable task to examine in detail the many decisions in salvage cases that have been cited by counsel on each side from the admiralty reporters in their exhaustive studies of the subject. A peculiarity of admiralty cases, more marked than in those illustrating any other branch of the law, is that there are seldom any two cases that are alike in more than one or two of their features : while they are so dissimilar in all other features as rarely to afford much ground for safe comparison. But I think they do show generally that the old rule of allowing to the salvors, arbitrarily, in every case, half the values saved, no longer obtains. Indeed, that rule came at last to so revolt the courts of admiralty that in their repugnance to it they went far towards the other extreme, and manifested a temper to confine themselves too much in their awards to the *quantum meruit* estimate of salvage services. There has latterly, however, been a recurrence from extreme views in that direction to the middle ground, of adapting the amount allowed to the

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circumstances of each particular case; giving always the *quantum meruit*, and giving also, when the case admits of generous treatment, as liberal a *bounty* as may be just and proper. For there are many cases in which, however meritorious the service may have been in respect to all the ingredients of salvage service that have been discussed, and however anxious the courts may have been to grant the *bounty*, yet the fund in hand for disposal did not afford the allowance of more than "*adequate remuneration*."

Admit that a ship and cargo have been in great danger, and that the services of the salvors have been exceptionally meritorious, and such as ought to be rewarded by the court with liberal hand; yet how obvious is the reflection that this may not be done at all with any justice in some cases, but may be justly done with free hand in others. And this brings me to the seventh consideration proper to be observed in an ordinary salvage.

7. In the case of *The Isaac Allerton*, Marvin, Wrecks & Salvage, 122, (note,) the court in awarding half of \$96,000 for salvage, said:

"It is a settled rule of decision in this court, from which it rarely or never departs, that the amount of salvage in a case where the vessel is lost shall be less, though the proportion may be greater, than in a case where the vessel is saved, *cæteris paribus*; and, in proportion somewhat to the promptness and skill with which a vessel is rescued from peril, is the reward to be increased. The reasons for this rule are several, but one is very obvious. When the vessel is lost there is usually a great loss of property; and we are not to aggravate this loss by charging the little that may be saved with a greater salvage than the claims of simple justice to the salvor may demand; and the claims of simple justice to the salvor do not, ordinarily, extend beyond a fair compensation *pro opere et labore*. All beyond this is gratuity, given or withheld by the courts upon grounds of public policy. When the vessel and a large amount of property have been lost, and a fragment only saved, there is little reason, and less means, for giving gratuities. But

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when the vessel and entire cargo have been rescued from certain peril, a substantial service has been rendered the owners by preventing a loss; they can afford a more liberal reward; and sound policy dictates the propriety, and the amount of property saved furnishes the means, of making a liberal remuneration. Hence the interests of owners and wreckers are made to harmonize."

Of course the learned judge, in the foregoing just observations, does not intend to declare that there are no cases in which salvors are to be allowed a liberal bounty over and above ordinary wages, even though much property was lost and its owner distressingly impoverished; but in the great majority of cases his principle is eminently just, and I thoroughly concur in the rule of action which he propounds. And therefore I do not agree with counsel in this case in their opposing views on the question whether the percentage allowed for salvage shall be less on large values rescued than on small ones, or whether it shall be greater. I think, with the court, in the case of *The Isaac Allerton*, that the proportion of the property lost must enter into consideration. In a case in which, out of property worth \$200,000 in danger, only the value of \$50,000 was rescued, I would give a smaller percentage for salvage than I would in a case where, other circumstances being equal, property worth \$50,000 was in danger and was all saved. In the first case, other circumstances being the same, and the service such as equally to deserve a liberal allowance, I might feel it unjust to give more than *one-tenth*; while, in the second, I might think it equally unjust to allow less than *one-half*.

The many cases cited in the arguments of counsel show, apparently, a great latitude of discrepancy in the amounts of salvage decreed; yet I think if they are studied with some reference to the proposition set forth in *The Allerton Case*, they can be well nigh harmonized. But, whether with or without reference to this consideration, I will now proceed to notice some of the cases cited at bar.

In the case of *The Thetis*, 8 Haggard, 14, much relied upon by counsel for respondent, one of his *Britannic*

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majesty's ships, having on board bullion to the amount of \$810,000 belonging to private persons, sank off the Brazilian coast in a cove or inlet between two islands. The salvage was effected by vessels and their crews of his majesty. It was a case, as the judge said, "quite out of the ordinary class of salvage cases;" alluding, I suppose, to the fact that the treasure was private property, was lost by a public vessel, and was recovered by ships and persons in the government service. It had been for a long time held in England that where persons in government employment effected salvage, they were to be allowed "adequate remuneration;" but it had not been held that they should also be allowed the stimulant of the *bounty* which is awarded to voluntary salvors who are not employed in the public service. The case is described in the syllabus as one of "salvage of private treasure and government stores (lost on board a king's ship) by officers and men of the royal navy. Comparative claims of the admiral and subordinate officers. One-fourth of gross value awarded. Upon appeal a further sum awarded of £12,000, (\$60,000.) Gross quantity of the treasure recovered, £157,000. (\$785,000.) The whole sum deducted for salvage, admiralty claim, and for expenses being £54,000, (\$270,000.)" The work of salvage had consumed 18 months, and had employed a good many men, and several ships, as well as expensive material. Here there was loss by a public ship of nearly half of a private treasure. The salvage was performed by public vessels, and by persons in government service; and, notwithstanding the outright loss of nearly \$25,000, there was allowed in the form of salvage (or further loss) more than one-third of what was saved. In the previous case of *The Mary Ann*, 1 Haggard, 158, the question was whether the officers and crew of a revenue sloop of his Britannic majesty, whose duty it was to give aid to distressed British vessels, should be awarded salvage in a case in which they had come to the aid of a ship in great distress, bound from Jamaica, and found in utter helplessness off the western coast of Ireland. She had been under continued stress of weather, was full of

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water, was out of provisions, and was drifting fast towards the rocks. She was boarded, and the ship and cargo, though greatly damaged, saved. The demand of the libel was "for remuneration of salvage services," not for the extraordinary bounty given to voluntary salvors. The court said :

"Undoubtedly the parties may fairly claim a remuneration. Although the ship belongs to the state, and although there is an obligation upon king's ships to assist the merchant vessels of this country ; yet, when services have been rendered, those who confer them are entitled to an *adequate reward*."

In this case there had been great loss ; there was far from a complete saving of property ; it was saved by men whose duty it was to attempt the task ; and yet, although the salvors demanded and could only recover a fair remuneration for their services, the court awarded *one-third*.

In the case of *The Amerique*, 1 Am. Law & Eq., 17 ; S. C. L. R. 6 Priv. Co. App., 468, only 10 per cent. was given, although there was no loss of ship and cargo, the steamship *Amerique* having been found floating in the ocean abandoned by officers, crew, and passengers, and having been simply towed into port. It was a case of technical derelict, but the other ingredients of a salvage service were wanting. The court gave but one-tenth, on the express ground that the services rendered were inconsiderable, and the demand out of all proportion to them. When enterprising mariners find a ship worth hundreds of thousands of dollars floating quietly on the ocean, it does not require the stimulant of a 25 or 50 per cent. bounty to inspire them to tow her into port. The court looked at the reason of the law, and not at the letter, in this case, and refused to "stick in the bark."

In the American case of the *Steam-ship Swiftsure*, 4 Fed. Rep., 463, the ship, mistaking the channel, went ashore on the sand beach north of Cape Charles at 9 A. M. of a clear day in May, 1880, on a smooth sea, and lay there until 2 o'clock waiting to be floated off by a tide ; her chief officers drunk. At that hour two very strong steam-tugs, which,

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in pursuing their regular business, had been looking for vessels coming in to be towed, came alongside, and on being asked to go to work, made fast two hawsers to the stern of the ship, and the two tugs, pulling together, and aided by the powerful propeller of the ship, soon got her afloat and out to sea, when they let her go, and she came herself into the port of Baltimore. The value of ship and cargo together was \$125,000. There was no damage; everything was saved. Here the owners could well have afforded the allowance of a liberal *bounty*, in addition to a fair remuneration for actual service, if the case had contained the ingredients which make up every true salvage service; but it did not contain those ingredients. The danger of the ship at 2 o'clock, whatever it might have become 12 hours later, after night had supervened, was in fact very inconsiderable; and the service of the two tugs was very little more than that of towage. The salvors were in absolutely no risk. The skill shown was no more than what the rudest tugmen who had never seen a wreck might have exhibited. The time was but three hours; for the tugs were already out there in the course of their regular calling, looking for tows. The judge thought that the ship was only in prospective peril, because, at the time the tugs went to work with her, the wind and sea were increasing, and that part of the coast was dangerous, and liable to sudden storms. This peril was the only salvage ingredient in the case, and it was prospective. But for it the service would have been strictly one of towage. And so the judge says, as if apologetically for admitting the element of *bounty* in his award at all:

“The allowance in such cases is intended to be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam-vessels sufficiently powerful to make the assistance effective. It would be contrary to the spirit of the maritime law to reduce the salvage compensation below the standard of liberal inducement, and it would equally frustrate its purpose if the al-

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lowance should be so large and so out of proportion to the services actually rendered as to cause vessels (in critical situations) to hesitate or decline to receive assistance because of its ruinous cost."

And so, rejecting the demand for \$40,000 as exorbitant, the judge awarded the sum of \$2,500.

In the case of *The Blackwall*, 10 Wall., 1, where a ship on fire at anchor in the harbor of San Francisco was saved by city firemen, aided by a tug, there was much damage by fire, and the water thrown by the firemen; but the ship and cargo, after the extinction of the fire, were valued at \$100,000. The firemen were at work 80 minutes. Though the ship was in great danger, neither the firemen nor their engine, nor the assisting tug, were in any serious danger, if any danger at all, during the service. The case was wanting in some of the important ingredients of salvage services, yet the court allowed *one-tenth*.

In the case of *The Camanche*, 8 Wall., 448, valuable property designed for the construction of a naval monitor was sunk in or near a dock in the harbor of San Francisco. The libel was for salvage on that proportion of the property which was not insured, worth \$75,000; the service for the proportion which was insured having been compensated by contract. The service consisted in saving heavy material from the bottom of the harbor by means of diving bells and lifting machinery. It could only be done by skilled men, and by the use of expensive machinery. The labor was arduous. The work was attended with danger and great difficulty. It lasted from January 28 until May 20, 1864, nearly four months. The amount allowed was one-third of the value saved; the salvors receiving proportionate compensation in addition from the insurance companies.

I need not pursue the examination of reported cases further. I have referred to these that have been named only for the purpose of illustrating the principles of my present decision.

The case of the *Sandringham* was one into which every ingredient of a true salvage service entered materially.

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The ship herself was in great peril; indeed, her condition was well nigh hopeless. In the event of her sinking in the sand, filled with compressed cotton tightly compacted, the cargo could only have been saved partially, with difficulty, and in a damaged condition. The task of the wreckers was full of toil and risk, performed as it was on a dangerous coast, liable to sudden storms and sea-swells. The work was bravely undertaken, perseveringly and faithfully pursued, and successfully accomplished. There were several steamers engaged, which are always accorded a higher compensation than other vessels. 8 Wall., 471; *The Kingalock*, 1 Spinks, 267. There were schooners, barges, surf-boats, and much valuable wrecking material also at hazard, without insurance. There was no loss to the owners; every bale of cotton was saved, and not a bale was damaged.

I think the services and the precedents concur in justifying an award of one-fourth of the aggregate values saved, estimating that aggregate value to be \$198,000. I will decree one-fourth of that amount and costs.

"I have been thus elaborate in setting forth the grounds of my award in this case because of the language used by the supreme court of the United States, (8 Wall., on page 479:)

"Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services."

I have desired that in the event of an appeal from this decision the facts and principles on which it is based may be fully understood by the courts above.

Thirty days will be allowed for an appeal. There was no appeal.

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*United States District Court for the District of Maryland,
February, 20, 1882.*

THE LEVERSONS.

Where, in a libel by the owners of a sailing-vessel against a steam-ship for damages for a collision, the testimony was in direct and irreconcilable conflict, and the testimony of the libellant's witnesses was discredited because of the improbabilities of the case attempted to be established by them, the libel was ordered dismissed.

IN ADMIRALTY.

This case having been once argued in the district court, the judge, after considering the case, directed a re-argument. It was then at his request, and with the assent of counsel, re-argued before both the district and circuit judges as if on appeal.

John H. Thomas, for libellants.

Brown & Brune, for respondents.

MORRIS, D. J. This libel is filed by the owners of the American schooner *David E. Wolff*, (122 tons,) against the British steamer *Leversons*, (916 tons,) to recover damages resulting from a collision in the Chesapeake bay. The schooner was bound down the bay from Baltimore to Portsmouth, Virginia, laden with 200 tons of steel rails. The steamer was proceeding up the bay on a voyage from Liverpool to Baltimore. The collision occurred between 10 and 11 o'clock at night, on February 25, 1881, four miles S. E. by S. from York Spit light, the night being dark, but the atmosphere clear, and the wind a seven or eight knot breeze from the eastward. The schooner was struck on her port side, nearly at right angles, just forward of the mainmast by the bow of the steamer, and sank immediately in water,

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five fathoms deep. All those on board the schooner were drowned except the steward and the lookout, who were rescued from the water by boats from the steamer.

The case for the schooner, stated by the amended libel, is that the schooner was on a course S. $\frac{1}{4}$ W., with her sidelights brightly burning, when those on board saw the red light of the steamer a considerable distance off over the schooner's port bow; that the schooner held her course, and the red light of the steamer continued to be visible until the steamer was about abreast of the schooner, when the green light of the steamer became visible; that immediately upon seeing the green lights hails of warning were shouted by those on board the schooner; that the schooner made no effort to change her course until the steamer was in the act of striking her, when her master ordered her helm hard a-port to ease the blow, but before the order could be executed the steamer struck her port side, nearly amidship, and she sank in a few minutes.

The case for the steamer, as stated in the answer, is that she was on a course N. by E., her speed six and one-half miles an hour, in charge of a pilot, when the lookout reported a white light a point or a point and a half off the steamer's starboard bow, apparently borne by a vessel at anchor; that the pilot, upon looking at the light for a short time with a glass, discovered that it was on a vessel under way, showing no side light, and that she was changing her course and going across the steamer's bow; that thereupon he signalled to reverse the engines full speed astern, and ordered the wheel hard a-port; that at the moment of collision, which occurred very shortly afterwards, the steamer's headway was almost checked, and her bow was going off to the starboard or eastward.

The allegations of the libel and of the answer are contradictory in almost every material point, and the testimony adduced in support of each utterly irreconcilable. I have found the attempt to discover how the collision was brought about attended with more than the usual embarrassment. At the conclusion of the first hearing I was strongly inclined

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to take the same view of the case as at present, but a great anxiety lest by overlooking some fact, or failing properly to estimate some portion of the testimony, I might be doing injustice to men who have already been great sufferers by this disaster, caused me to hesitate. After a second hearing I find my first impressions strengthened, and I am able to adhere to them with increased confidence since the learned circuit judge, with his larger experience in dealing with such cases, has independently arrived at the same determination.

Why it is that in case of direct conflict the statements of some witnesses convince the mind, and the statements of others fail to do so, is often difficult of explanation, and in this case I shall be able to do hardly more than indicate some of the considerations which have had influence in bringing us to the conclusions I am now to announce.

It is first to be noticed that the case stated in the libel is highly improbable. It is alleged that the red light of the steamer was seen for a considerable time off the schooner's port bow; that the schooner never changed her course; and that the steamer's red light continued to be seen until she was about abreast of the schooner. The wind was fair for the schooner—a seven or eight knot breeze—and her speed must have been about the same as that of the steamer, viz., six and one-half miles an hour. How was it possible, then, for the steamer, continuing to show her red light on the port side of the schooner until she was abreast of her, to then turn a right angle and strike the schooner a perpendicular blow amidship before the schooner passed by? These allegations of the libel were, of course, based on the statements of the schooner's steward and lookout—they being the sole survivors—and their testimony, as given in court as to the movements of the two vessels, increases rather than diminishes the difficulty of comprehending why the vessels came into collision.

The lookout of the schooner states that he first saw the steamer's red light over the port bow upwards of a mile off; that he continued to see the red light until those on the

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schooner began to halloo; that the red light was well off the schooner's port bow; and that when the steamer's green light opened and he saw both of the steamer's lights, she was fully abreast of the schooner, well back from the bow, where he was standing, and about opposite to the midship of the schooner.

The steward testifies that he was standing aft of the wheel and saw the red light over the port bow when it was reported, eight or ten minutes before the collision; that he continued to see the red light well on the port bow, until the steamer was about two of her lengths off and abreast of the schooner's forward rigging, when both the steamer's lights became visible to him, and suddenly her red light disappeared and the steamer struck them amidship, the steamer's stern inclining toward the stern of the schooner.

Making all possible allowances for mistakes as to time or distance, it still seems to us impossible to understand how the collision could have occurred in the manner or for the reasons given by these witnesses; and as the libellants' case rests on their testimony, it is only reasonable that, in examining other statements made by either of them, we should be quickly impressed by any improbabilities.

In the testimony of the steward he states very positively that he was standing by the binnacle just prior to the collision, and noticed the compass and course of the schooner, which he states was S. $\frac{1}{4}$ W., with the wind E. S. E. From his answers under cross-examination it is obvious that he is ignorant of navigation and of the points of the compass; and one wonders that although it was not at all in the line of his duty he should have observed and be able to give the schooner's course to a quarter of a point. The fact that we find on the coast-survey charts the course for a vessel proceeding southward at the point of collision marked down as S. $\frac{1}{4}$ W. must give rise to suspicion. On a sailing vessel of that humble class, used only in the bay traffic, with 200 tons of iron in her hold, it would be remarkable to find her compass agreeing to such nicety with the course marked on the chart. And indeed if it were true that her compass did

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so indicate, it would be by no means conclusive evidence that such was her true course.

There is another statement made by both steward and lookout which is difficult to account for. The schooner's crew consisted of the master, mate, and two seamen, and the steward; the latter not doing duty as a seaman and not being in either watch at the time of the collision. The only men, therefore, whose duties required them to be on deck were the mate and the lookout. The collision occurred between 10 and 11 o'clock, and the watch of the master and the other seaman did not begin until 12. The night was very cold. The weather had been so cold and the upper part of the bay so full of ice that the schooner had been four days getting from Baltimore, and had gone into harbor four times in making less than 200 miles. The testimony of these two witnesses is that every man had been upon deck for a long time before the collision occurred, and they are able to give no reason for it except the steward's statement that the captain came up about half past 9, saying he could not sleep, and the lookout's suggestion that they were all up, perhaps, because they were going to anchor under Sewell's Point, which was not less than three hours distant from the place of collision. That all hands should have been on deck on such a night without having been called up by notice of danger seems very extraordinary, and to need some better explanation.

The amount of the loss in clothes and money which the steward says he sustained appears to be very unusual.

With regard to the schooner's course, while the course marked on the coast-survey charts, and given by the steward with such exactness, is the course for a vessel intending to pass out the capes, it does not appear to me that it would be the course for a vessel of small draught at the place of collision bound for Sewell's Point or Portsmouth, Virginia. It would seem more reasonable that with a fair wind she should take as direct a course as possible, and it appears from the charts that she would have sufficient depth of water on a course a little east of the Thimble light, which bears S. W. by S. from the place of collision.

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Carefully, and I trust fairly weighing the testimony of these two witnesses for the libellants, I find in their statements so much that seems impossible, so much that is highly improbable, that, notwithstanding their most positive and circumstantial evidence that the lights of the schooner were burning brightly, I have not been able to bring myself to think that it would be safe to find any fact as established by their uncorroborated testimony.

We come next to the testimony adduced in behalf of the owners of the steamer, and to the consideration of the question whether, even if the libellants' testimony does not account for the collision, any facts are proved which show that the steamer was in fault in not keeping out of the way and avoiding the schooner.

The pilot was a young man who had not yet obtained a full certificate to pilot vessels of over 12½ feet draught, and he was accepted by the master of the steamer only because there was no full branch pilot on board the pilot-boat which spoke him off the capes. His capacity and acquirements are, however, fully proved by the older pilots, and they seem to have thought well enough of him to appoint him master of their own steam pilot-boat. He states that he was on the upper bridge, and that the steamer had been for half an hour on a course north by east by her compass, but as the compass varied a point to the west, her true course, and the course he intended her to be on, was due north; that after she had been on that course half an hour the lookout reported a white light ahead; that he put up his glasses and saw a vessel with a white light about a point and a half over the steamer's starboard bow, and about 300 yards off; that at the first moment he supposed it was the light of a vessel at anchor, but that putting up his glasses he saw it was a vessel under sail, apparently moving in a southerly direction; that almost immediately he observed that she was changing her course so as to cross the steamer's bow; that he at once ordered the helm hard a-port, and signalled by the telegraph to reverse the engines at full speed astern; that under the port helm the steamer's bow

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went off easterly to N. E. by N., which was her direction at the moment of collision; that just before the collision, and when the port side of the schooner was towards him, he saw that the dim white light which had been reported came from her cabin; that if the schooner's port light had been burning he could not have failed to have seen it.

The pilot's testimony, that the schooner was about 300 yards off; about a point and a half on the starboard bow when first seen, and that she had no side lights, is confirmed by the testimony of the lookout, the man at the wheel, the boatswain, and by the master of the steamer. Their statements as to the change in the schooner's sails differ somewhat, but not more than might be expected when it is considered that the pilot alone had the aid of glasses, and that some of these witnesses did not make out the hull and sails of the schooner until she was very close. They all agree, however, that at the moment of collision the sails were on the schooner's port side.

A further analysis of the testimony of the persons on the steamer would be useless. We have become convinced that it is from their statements that we are to gather the facts of the collision, and we find no reason to disbelieve the substantial truth of the cause they assign for it. The principal difficulty I had at the first hearing arose from the testimony introduced by the libellants to impeach the boatswain of the steamer. A number of witnesses have testified that after the steamer arrived in port the boatswain, on several occasions, made a different statement about the schooner's lights, sometimes in the presence of the lookout and the wheelsman, who did not dissent from what he said.

If what these impeaching witnesses suppose the boatswain said in the conversations they report was really what he intended to say (which he denies), and he said what he believed to be true, then there can be no truth in any of the testimony of the steamer's witnesses from first to last. If he did intend to say that the schooner's red light was visible, and that she did not change her course, the acceptance of these statements as true would involve the collision

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in so much that is unaccountable and irreconcilable, that we hardly see how we could have believed the boatswain if he had, as a witness, sworn to what is sought to be inferred from these chance conversations with him. That the boatswain had but little opportunity to carefully observe the schooner is obvious. He states that he was trimming the lamp of the pole-compass when he heard the light reported; that as he came down on to the lower bridge he saw the small white light off on the starboard bow, and he took it to be an anchor-light. At that instant, he states, he heard the bells to stop, and, taking a better look, he saw the side of a vessel, and that a collision was imminent. He sprang from the bridge to the deck and ran on to the top-gallant forecastle just in time to see the schooner cut down and her mainmast fall over the steamer's bow, driving every one off the forecastle deck. With regard to what he is reported to have said as to the red light, I think the truth must be as stated by him in his testimony: that as he was running to get on to the forecastle he saw a red light, which was the fixed red light of the York Spit light-house, which bore about northwest, and which he then thought was a vessel's light, but that when he got up on the forecastle head he discovered its real character.

My own impressions as to the weight fairly to be given to the testimony which tends to impeach the boatswain have been much strengthened by the decided views of the circuit judge as to that branch of this case.

Counsel for the schooner have urged that even if it were true that the schooner's side lights were not visible, that her sails and hull might have been seen at a distance sufficient to have enabled the steamer to make out her course and avoid getting so close to her. The night was dark, with a clear atmosphere; and the testimony of experts shows that on such a night a vessel without lights should be seen with the naked eye from 300 to 400 yards off. The distance would, of course, vary with the size of the vessel and the spread of her sails. This schooner was almost of the smallest class, and when approaching the steamer her

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sails were rather flat aft. The testimony of those on the schooner shows that she was discovered at the distance at which she might reasonably be expected to be seen by an attentive lookout. It is, however, suggested that had the pilot more diligently employed his glasses in searching for lights ahead, he might have discovered the schooner before she was reported by the lookout. It seems to me, however, that the special use of the glasses is rather to more clearly discover the character of an object that has been already discovered. At all events, I do not think that an ordinary steamer, running at a moderate speed in a bay over ten miles wide, should be condemned for having failed to discover a sailing-vessel without lights merely because there is a possibility that if the officer or pilot in command had been constantly sweeping the horizon with a good pair of glasses, the vessel, even without lights, might have been seen in time to avoid her. In our judgment the steamer has been shown not to have been in fault, and the libel must be dismissed.

*United States District Court for the Eastern District of
Virginia, at Norfolk, March 9, 1882.*

CHARLES W. PETTIT v. THE STEAMER CHARLES HEMJE.

- *1. A material-man who places necessary repairs upon a vessel, may proceed against her *in rem*, although he is a part-owner.
2. His lien in such case is postponed to any other maritime claimants to whom he is personally responsible for their bills; but may be enforced against the other part-owner or his assignees, such as mortgagees of the interest of the other part-owner.

IN ADMIRALTY.

Sharp & Hughes, for libellant.

Walke & Old and *W. G. Elliott*, for the mortgagee.

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The libellant and John H. Wemple were owners of the steamer Charles Hemje, Wemple being managing owner. Wemple becoming embarrassed, gave a mortgage to the Home Savings Bank upon various interests that he owned in different vessels, his interest in the Charles Hemje among the number, to secure it for large advances made by it to him to enable him to carry on the many different branches of business in which he was engaged. At length he failed, and immediately the different maritime creditors of the Charles Hemje libelled her for their bills incurred whilst being run by Wemple. The libellant, Pettit, was a boiler-maker and machinist, and had furnished a new boiler to the Charles Hemje, and done various work upon her, amounting to about \$3,300. The Home Savings Bank intervened and resisted his claim, on the ground that he could not maintain a libel against a vessel in which he was part owner.

HUGHES, J. It is to be observed that the question here is not whether a part-owner has a lien upon the vessel for advances and disbursements over and above his proportion. The counsel for the respondent have argued forcibly against such a right; and it must be confessed that the authorities on the subject are in hopeless conflict. It is settled that admiralty has no jurisdiction of suits for the mere settlement of accounts between part owners, owners and their agents. *Steamboat Orleans v Phœbus*, 11 Pet., 175; *Min-turn v. Maynard*, 17 How., 477.

But no case goes so far as to hold that the mere fact of an account being incidently involved is sufficient to defeat the jurisdiction. In the *Larch* case, 3 Ware 28, Judge Ware, after full consideration, decided that such a lien existed, and that it was enforceable in admiralty. It is true that this decision was subsequently reversed by Judge Curtis, (see 2 Curt., 427), but the learning and reputation of Judge Ware entitles it, though a reversed case, to the highest respect in another circuit, where the decision of Justice Curtis is only persuasive. The English authorities

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on the subject are irreconcilable, while the American authorities rather preponderate in favor of the existence of such a lien. See Story on Partnership, sec. 441 and seq. and notes, where the cases *pro* and *con* are collated and discussed.

But, however that may be, there is a wide distinction between that doctrine and the question now before me for decision. The libellant is not trying to assert a lien for advances made by him as part-owner. He is not in court as a part-owner. He is here in a different capacity, claiming for work put upon the vessel in a different capacity. He is here as a material man, trying to assert the lien given by the admiralty law to all who furnish supplies or repairs to a vessel. The reasons and policy of the admiralty law apply as forcibly in his favor as in favor of any other material man. The mere fact that he is part owner furnishes no reason why he should be denied the security enjoyed by others, unless for some special reason he has estopped himself from asserting his claim. Of course an admiralty court, in the exercise of its extended equity powers, will not allow him to deprive other maritime creditors to whom he is personally responsible, of their security. But the mortgagee of the other part-owner's interest is a mere assignee of that other part-owner, and can set up no defenses which that other part-owner can not set up. The mortgagee has a lien only on the interest of its assignor, and that interest is nothing until the maritime claims are all paid. Nor is there anything in the technical objection that to allow such a proceeding would allow a man to sue himself; for the real defendant in an action *in rem* is the vessel.

In the case of *The Pilot No. 2*, Newb., 215, a libel by a seaman, who was part-owner of a boat, for his wages was sustained, the court basing its decision on the ground that his service as seaman was in a capacity distinct from and unconnected with the appropriate business of a partnership such as exists among part owners of a vessel. We may say the same of a material man. In the case of the *West Friesland*, Swa., 454, Dr. Lushington sustained a libel against

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a vessel for supplies by a firm, one of whom was a part owner, saying, "That Mr. Bremer was a part owner is only a technical objection. At common law partner cannot sue partner, but that is a rule that does not obtain in this court; and here the property is sued, and not the co-partner."

I can see no ground, therefore, either on principle or authority for denying to the libellant his lien. I will sign a decree ordering his claim to be paid next after the other maritime claims and in preference to the mortgage.

[NOTE.—In the cases of *The Feronia*, 3 Mar. Law Cas., 54; *The Joseph Dexter*, Id., 248; *The Underwriter*, 1 Asp. Mar. Law Cas., 127; *The Jenny Lind*, Id., 294; libels by part-owners were maintained.]

*United States District Court, Eastern District of Virginia,
at Norfolk, March 22, 1882.*

THE BAKER SALVAGE CO. v. THE BRIG MARY E. DANA.

A brig loaded with lumber is waterlogged off Ocracoke Inlet, in January, 1882, and telegraphs for a public vessel of the United States revenue service. The libellant hears in Norfolk of her flying signals of distress, and sends a strong wrecking steamer, with pump and all wrecking material on board, 157 miles, to her relief. This tug and the revenue cutter both arrive; and the brig engages the tug; chiefly because she needs such a pump and engine as one on board the tug, which can be got nowhere else between Norfolk and Charleston; and which is necessary to her reaching port. The brig is taken in tow by the tug on a Saturday, and is towed to Norfolk in rough sea and weather, though there were no dangerous storms; but owing to a deficiency of coal on the tug, they have to lie by during head winds for fifty hours out of ninety-six, and do not reach Norfolk, until Wednesday night; the brig all the while having had the libellant's pump and engine on board and in necessary use. The value of all property saved was \$4,300. A libel being filed for salvage, and \$1,000 deposited by way of tender by the respondents.

Held, that that amount must be allowed, but the court stated that a less amount would have been granted if there had been no deposit.

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Held, further, that, as every salvage award consists first of the *compensation* due for the labor and material actually expended by the salvor ; and second of the *bounty* allowed for enterprise, risk and success in the service ; this latter ingredient should be larger for salvage services on the long and dangerous seaboard stretching from the Delaware capes to Key West, than on other coasts ; especially in cases like the present, where the salvor went 157 miles, along a dangerous coast, in rough winter weather, to the rescue of a vessel in distress.

Ellis & Thom, for libellant.

Sharp & Hughes, for respondent.

The Brig Mary E. Dana, from St. Simon's Mills, Geo. , bound for New York, loaded with 100,000 feet of lumber, when about fifty miles E. N. E. off Cape Lookout, sprang a leak in a gale of wind, and at 9 P. M., of Tuesday night, the 17th of January 1882, was leaking so badly that her master, Capt. Benson, found it necessary to make for land. The gale abated on Wednesday morning, and on Thursday morning the 19th, the brig had anchored off Ocracoke Inlet.

She lay easy all that day and night ; and the captain having with his crew gone ashore, telegraphed to Washington, N. C., at the Life Saving Station at Ocracoke Inlet, asking that the U. S. Revenue Cutter, Colfax, might come to his assistance. Capt. Benson and his crew on going ashore, took with them their most valuable personal effects.

The brig was waterlogged, and drew 12 feet forward, and 18 feet aft. Her deck was out of water, and being filled with lumber tightly stowed, there was no danger, or very little danger, of her being foundered or broken up. There was also, a telegram sent by some one to the Baker Wrecking Company in Norfolk, to the effect that a brig was anchored off that inlet showing signals of distress. This telegram arrived in Norfolk between nine and ten P. M., Thursday night the 19th, and the Victoria J. Peed, a very strong wrecking steamer and tug-boat of 132 tons, worth \$25,000, having on board wrecking material worth \$6,000, set out for the place where the Dana lay, at about eleven

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P. M. that night, under command of Capt. Orrin S. Baker, with five or six other seamen on board.

The Peed reached the brig at about 7:30 P. M., Friday night the 20th, having gone a distance of 158 miles from Norfolk. Having found by inquiry on board, that the brig needed and desired assistance, the Peed anchored at a short distance until the morning.

At 4:30 next morning the Colfax arrived. Early on this morning (Saturday, the 21st,) Capt. Benson of the brig was in conference with the master of the Colfax, the master of the Peed, and Capt. Sol. Dickson, a pilot on that coast. The question for him was, whether he should put his vessel in charge of the Colfax to be towed to Newberne or Beaufort, or into the sound through Ocracoke Inlet, piloted by Capt. Dickson; or whether he should put himself in charge of the Peed.

The brig needed to be pumped out, and the Colfax had no sufficient engine and pump. There was no such pumping engine on the coast south of Norfolk, except those of the Baker Wrecking Company, one of which was on the Peed ready for use. There were 12 feet of water on Ocracoke bar, and Capt. Dickson thought the brig could be taken in on high tide without much risk.

The brig was not in the danger in which most waterlogged vessels generally are, from the fact of being loaded with lumber tightly stowed in the hold. If kept pumped out, she could proceed under sail. The fact that her captain did not get himself towed inside the bar, through Ocracoke Inlet, by the Colfax, would seem to argue that he was not in a desperate or very dangerous condition. It would seem that two considerations moved Capt. Benson to engage with Capt. Baker and the Peed. 1st. That he thereby secured at once the use of a pump. 2d. That in going with Baker into Norfolk, he would be proceeding toward his port of destination. He accordingly, put himself in charge of Capt. Baker, and the engine and pump were put upon the brig on the morning of Saturday the 21st January, and the pump was got to working after some delay, produced by the

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difficulty of getting the suction hose through the deck and down through the lumber to the keelson of the vessel,—say at 2 P. M. The pump was found to be very efficient, and was able during the trip to Norfolk to keep the water down by pumping one-fourth the time. By 8 P. M. the water was reduced some two feet in the hold, and the vessel's draft in the water lightened about one foot. At that hour she was taken in tow by the Peed.

A breeze had sprung up from the southard, which increased as the two vessels proceeded toward Hatteras. Growing squally and rain coming on about 5 P. M., and the wind increasing into a gale by 12 P. M. The wind, however, was favorable, and the brig had some of her sails set. They were moving very rapidly in a trough of the sea, and by 10 P. M. were heading easterly. This strong wind from the southard would have obstructed and endangered the brig if she had gone in tow of the Colfax in the direction of Beaufort. The vessels made considerable headway until 8 A. M., on the morning of Sunday the 22d, and got past Cape Hatteras; but by 9 A. M. the wind had changed and was ahead, blowing very hard until 6 P. M. of the same day; the distance gained in the last nine hours being only ten miles. At dark on Sunday evening, they were north of Hatteras and about eight miles south of Body Island, off Chicamcomico. Here they anchored, having in this first movement consumed twenty-five hours.

Here both vessels anchored, each with one anchor; the Peed taking in her hawser; and laying off about a mile from the brig. Owing to the head winds the two vessels lay off Chicamcomico all Sunday night, and on Monday till 3 P. M., at which hour the Peed again took the brig in tow and proceeded up the beach. During this anchoring the wind had not been strong enough to cause the brig to drag her anchor; but had been strong enough to cause the Peed to drag hers, which was a light one, until she put down her heavy anchor.

It was during this interval, say about 10 A. M. on Monday, that Capt. Baker went alongside the brig and inform-

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ed her that he would have to be careful of his coal, as he was short of it.

The two vessels having got under way the second time, on Monday at 3 P. M., proceeded up the beach with the wind blowing from north and west. The wind increased during the night, and after midnight blew hard. About 4 A. M., Tuesday the 24th, it had got so strong that the vessels were making no headway, and the brig was directed to let go her hawser and to anchor. Capt. Benson objected strongly, but complied with the order, and came to anchor, putting down but one anchor.

The Peed moved off under steam until she got in the hawser, and then without putting out her anchor, stood off under a staysail and a slow action of her engine and screw, for about four hours, when she returned to the vicinity of the brig which was between 7 and 8 A. M., Tuesday the 24th. In this second movement, which lasted about thirteen hours, the vessels had gone from off Chicamicomico to a point off Oregon Inlet and Wash Woods, or False Cape.

Capt. Baker had no intention of abandoning the brig on the morning of Tuesday, the 24th, when she anchored at this latter point. The wind blew heavy, and the two vessels lay at anchor all day Tuesday, and all the following night, during which time the wind was too much ahead and too heavy to afford the hope that any progress could be made with a limited supply of coal.

The wind became favorable early on Wednesday morning, the 25th; and the vessels proceeded to take in their anchors; but the brig was delayed in getting hers up, and lost it by the parting of her anchor chain. They got away from False Cape about 9 A. M., on Wednesday; passed Cape Henry about 12 M.; and arrived in the port of Norfolk about 5 P. M. that day;—four days and four nights from Ocracoke.

The trip seems to have been prolonged by a deficiency of coal. The capacity of the coal bunkers of the Peed is 35 tons. The daily consumption is six tons. She left Norfolk without filling her bunkers.

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Capt. Baker says she had 4½ days supply when she left : that is to say, about 25 tons. The engineer, Sutton, says he had enough coal for the trip : within three or four tons of her full supply ; which would be about 30 tons. The first mate, Johnson, says she took no coal on before leaving Norfolk, and had within four or five tons of her full supply. The second engineer, Cenprew, says she had 21 or 22 tons.

Capt. Benson, of the brig, says that at Ocracoke, on the morning of the 21st, the mate and the master, Johnson and Capt. Baker, both asked him about coal, and told him that they did not have enough.

The Peed consumed some six tons on the way to Ocracoke, and her officers say they put two to two-and-a-half tons on the brig at Ocracoke, to be used in the donkey engine. It is not probable, therefore, that the Peed had much more than 15 to 17 tons when she set out from Ocracoke on Saturday in charge of the brig. Much economy was used on the trip to Norfolk ; and, on arrival there, the coal on board was only about three-quarters of a ton. While underway the first time they were in motion twenty-five hours ; during the next time they were underway they were moving thirteen hours ; and on Wednesday, the last day of the trip, they were in motion eight hours.

All this made forty-six hours : and so there could not have been consumed more than two days' supply—say 12 or 15 tons of coal. It would seem pretty clear, therefore, as before suggested, that when the Peed first took the brig in tow she had not more than some 16 tons of coal ; and that she would have been short of coal if she had not stopped on several occasions and laid by, when the wind was ahead and heavy.

This deficiency of coal, however, does not signify much in this case, especially as Capt. Benson admits in his testimony that both Capt. Baker and mate Johnson informed him at Ocracoke that the Peed was short of coal. He engaged her with knowledge of the fact.

As to the weather, there was no storm to endanger

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either vessel: though both wind and sea were in general rough. Capt. Benson says that the fire in the donkey engine, the door of which was fourteen inches above the deck of the brig, was at no time put out by the sea coming over his deck. The brig lay at anchor during the roughest weather, and at no time had down more than one anchor: and at no time dragged that anchor. Capt. Benson says his vessel could have carried his top-gallant sails at any period of the trip.

Towing off that coast by such a tug as the Peed is worth \$200 a day. Such a pump as hers is worth \$25 a day. The value of the brig was \$3,000; and that of her cargo \$1,800, the whole value saved therefore being \$4,800. The value of the property risked by the wreckers was, as before stated, \$31,000. The claim of libellants is for one-half the value of the property saved. Respondents have deposited in court as a tender \$1,000, together with costs up to the date of tender, to-wit: \$36.87.

HUGHES, J. In this case, the questions are, was this a meritorious salvage service; and if so, what ought to be awarded to the salvors by the court.

The amount of salvage to be accorded in any case depends upon the following considerations:

1. The degree of danger from which the lives or property are rescued.
2. The value of the property saved.
3. The risk incurred by the salvors.
4. The value of the property employed by the salvors in the wrecking enterprise, and the danger to which it was exposed.
5. The skill shown in rendering the service.
6. The time and labor occupied.

Estimated by these considerations, the case at bar does not in its facts, present a claim of high grade. The reported decisions of the admiralty courts do not justify a large award in the way of bounty for such a service as was rendered here. See *The Albion*, Lush., 282; *The Cor-*

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omandel, Swa., 205; *The Cleopatra*, L. R., 3 Prob. Div., 145; *The Senator*, Brown's Adm., 372; *The Rebecca Clyde*, 5 Ben, 98; 2 Parsons, Sh. and Adm., 293, and cases cited in them.

The vessel saved, though in much danger, was not in extreme peril. True, she had been waterlogged; but being loaded tightly with lumber, she was simply reduced to the condition of a raft; but of a raft having a keel, a rudder, masts and sails, and capable of moving without help, especially if relieved by a pump, and of saving itself if there should be no violent storm. No such storm did in fact come on for four or more days, and so her escape from wreck would have been secured if only she could have got the use of a pump and of a donkey engine, with which to operate it. This is enough to say as to the condition of the brig. As to the salvage service, I will premise that I feel at liberty to give a larger award in the present case, than the admiralty courts usually allow in suits of like character, for several reasons which I will state:—

Salvage services rendered on the long and dangerous coast which stretches from the Delaware capes to Florida, ought to be more liberally rewarded than on other coasts. It is not a seaboard studded with harbors and prosperous commercial cities and towns, from which salvors may run out short distances along shore, and render successful services in a few hours. It is a long coast, dangerous and barren, constantly swept by strong winds and currents; where the ordinary tide varies only three feet, and on which wrecking enterprises cannot be successfully accomplished by individual exertion and capital. Wrecking service here can only be successfully performed by organized capital, enterprise and skill; by capital, skill and enterprise, so organized as to be capable of maintaining a constant provision of experienced mariners, powerful wrecking vessels, and ample wrecking implements and material, ready at all hours for immediate service. The business cannot sustain itself in the hands of reputable men and companies, unless the admiralty courts shall give exceptionally liberal

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rewards in all cases of meritorious and successful service on this seaboard. And surely it is in the interest of commerce to sustain the wrecking business in these waters and latitudes. For these reasons I repeat, salvors on this coast must be more liberally dealt with by the admiralty courts than on other coasts.

The salvage service which was rendered in the present case, though not of any unusual difficulty and risk, was yet highly meritorious.

1. The promptitude with which the *Peed* was sent out one hundred and fifty miles along a dangerous coast, to the succor of a vessel in distress, deserves marked recognition.

2. The disproportionate excessive value of the property placed at risk by the salvors, compared with that of the property saved, deserves consideration.

3. The excellence of the vessel sent out, and of the wrecking material, including the engine and pump on board of her, and the skill and worth of the officer in command, and of the men under him, are to be recognized by the court.

4. That the *Peed* had not on a full supply of coal, does not affect the merit of the service; the fact that she went out without staying long enough to complete her already good supply of coal, is rather an element of merit than otherwise, for delay in such a case might be fatal. The deficiency of coal, therefore, only affects the *quantum meruit*, by diminishing the time to be computed for the towage service.

For the several reasons which have been thus stated, I feel justified in granting a more liberal reward in the present case, than would seem to be warranted by the general current of decisions in salvage suits. But obviously, I am not at liberty to disregard, too far, the average teaching of the precedents. I must at least keep in sight of the land.

5. I am the more emboldened to such a course in this particular case, because of the fact that the respondent has made a deposit in the nature of a tender in the suit of an amount as great as I could, on the most liberal principles, allow.

The award in salvage causes consists generally of two

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ingredients, viz.: 1st, the *quantum meruit* which is a certain quantity to be paid in any event if the saved property will yield it; and 2d, the bounty, which is a variable element, depending upon the accidental circumstances of each case.

In the present case, I think I ought to give in payment of services according to their actual worth:

For 48 hours, or 2 days of actual towing at	
\$200 a day,	\$400.00
For 4 days hire of pump and engine, at \$25,	100.00
For 1 day of the Peed in going out from Nor-	
folk to Ocracoke,	100.00
For bounty,	400.00
	<hr/>
Total,	\$1,000.00

I would not give so large a bounty as is allowed in the last item, but for the fact that the respondent has presumed conceded it was due by his tender. In the Sandringham case, where the vessel saved was in extreme peril; where the property of the salvors was in considerable risk for a week; and where there was a week of service,—hard service—during two storms, I awarded a fourth. Here, where all the conditions were such as to make a case of far inferior merit, I award nearly a fourth. I excuse the apparent discrepancy almost exclusively on the ground, that in this case there was a tender, which, in some degree operates as an estoppel. Else I would not have allowed more than \$200, or \$250, for bounty.

The amount of \$1,000 having been deposited by way of tender by the respondent, and also the sum of \$36.87, as the costs of the suit accrued up to the time of the deposit, the respondent must let the latter amount remain; and the rest of the costs must be paid by the libellant out of the fund in court.

Syllabus.

*United States District Court, Eastern District of Virginia.
Alexandria, March, 1882.*

A. R. STEWART v. THE POTOMAC FERRY CO.

A state law which, for a cause of action clearly maritime, either of contract or tort, arising on or committed by a ship engaged in commerce on any public navigable water of the United States, gives a remedy at common law in a state court by attachment *in rem* against the vessel specifically as debtor or offender, is in conflict with section 9 of the Judiciary Act of 1789, giving exclusive jurisdiction in admiralty and maritime causes to the admiralty courts; and this is so, even though the state law provide that the attachment of the ship be "in a pending suit."

A vessel lien law of a state, giving a lien upon any steamboat or other vessel, raft or river craft, for materials or supplies furnished to, or for service performed on, or for injury done by, such steamboat or other vessel; or for wharfage, salvage, pilotage, or claim on contract of transportation, due by such steamboat or other vessel; and authorizing any claimant for such supplies, services, damages or injury, or dues, "in a pending suit," in a court of the state, to sue out an attachment specifically and particularly against "the vessel, her tackle, apparel and furniture," as the debtor, or offender, or tortfeasor, "whether the cause of action arose without or within the state, and whether the owner be resident or not," and before process "in the pending suit" is served, either actually or constructively; such a law, and any proceeding under it, before service, either actual or constructive, upon the real owner of the vessel, violates the third division of section 711 of the Revised Statutes of the United States, giving cognizance to the United States district courts, exclusive of the state courts, of all civil causes of admiralty and maritime jurisdiction; and this is so, notwithstanding that part of the same provision which "saves to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Inasmuch as the rules of decision at common law enforce liens upon property in an order radically different from the order in which admiralty rules of decision enforce them, the common law is not competent to afford a remedy against a vessel engaged in commerce upon the public navigable waters, as between suitors having maritime claims against such vessel.

This is an action of trespass on the case, brought to recover \$10,000 damages for a tort, alleged to have been committed by a steamboat.

Statement of Facts.

The first section of the Virginia attachment law is as follows:

“When any suit is instituted for any debt, or for damages for breach of any contract, on affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant, or one of the defendants, is not a resident of this state, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk’s office an attachment against the estate of the non-resident for the amount so stated.” (Virginia Code, 1873, ch. 148, sec. 1.)

The Virginia Vessel Lien Law, as last amended, on March 12, 1878, is as follows:

“If any person has any claim against the master or owner of any steamboat or other vessel, raft or river craft, or against any steamboat or other vessel, raft or river craft, found within the jurisdiction of this state, for materials or supplies furnished or provided, or for work done for, in or upon the same, or for wharfage, salvage, pilotage, or for any contract for transportation of, or any injury done to any person or property by such steamboat or other vessel, raft or river craft, or by any person having charge of her, or in her employment, such person shall have a lien upon such steamboat or other vessel, raft or river craft, for such materials or supplies furnished, work done or services rendered, wharfage, salvage, pilotage, and for such contract or injury as aforesaid, and may, in a pending suit, sue out of the clerk’s office of the circuit court of the county, or of the corporation court, or of the circuit court of the corporation, in which such steamboat or other vessel, raft or river craft may be found, an attachment against such steamboat or other vessel, raft or river craft, with all her tackle, apparel, furniture and appurtenances, or against the estate of such master or owners. Any attachment may be sued out under this section for a cause of action that may have arisen without the jurisdiction of this state, as well as within it, if the

Statement of Facts.

steamboat or other vessel, raft or river craft, be within the jurisdiction of this state at the time the attachment is sued out or executed." (Virginia Acts of '77-8, page 217.)

The history of this act is of some interest. It has always been, in some form, part of the state attachment law. It originated in a police provision for attaching vessels engaged in harboring, for the purpose of carrying away, runaway slaves. Code of 1860, ch. 171, sec. 5, p. 646. By various amendments it was gradually enlarged and changed, until, in 1866 (see Acts of 1865-6, ch. 57, p. 171), it gave a right to proceed in a state court for nearly every subject of admiralty jurisdiction; and continued the right previously given to proceed directly against the vessel as the debtor or offender; the statute itself reciting, that the vessel might be arrested and proceeded against "without the previous institution of any suit," or setting forth the name of the owner. It may be added (what was part of the public history of the times) that in 1866, and for some time, under the ruling of the then judge (Underwood) of the United States courts in this district, none but counsel who could take what was called the *iron clad oath*, were allowed to practice in the Federal courts of Virginia; and the vessel lien law of the state was modified in 1866 by an act drawn by a very able lawyer, who rested under this political ban, so as to omit the provisions as to runaway slaves, and to give a general jurisdiction over ships, equivalent to the admiralty jurisdiction. Neither in this amending act, nor in any of its predecessors, was the word *lien* employed; the old civil law *privilegium*, that is to say, the right of proceeding against and arresting the ship as herself the contractor or offender, being given in all the previous statutes. But, in the final act of March 12, 1878, the words which authorized the proceeding against the vessel without the previous institution of a suit *in personam* against the owner, were omitted in consequence of what was said *passim* by the district judge of this district in the case of *The Raleigh, Cannon and Astoria*, 2 Hughes, 50 to 53, and of certain decisions of the supreme court of the United States hereafter mentioned, and a *lien* was given by name against vessels.

Statement of Facts.

In this condition of the law, the present suit was instituted in the circuit court of Westmoreland county, Virginia, on the 30th of September, 1880. The plaintiff had taken passage on the steamer *Arrowsmith* at the city of Washington, on the 26th of August, 1880, for Nomini, Virginia, and, while the vessel was still at the wharf at Washington, had been injured by the falling of a block of ice. The damages claimed are \$10,000. There has been no service of process on the defendant, who is alleged in the declaration to be the owner of the steamer.

On the same day on which the suit was begun, process of attachment was taken out against the steamer by name, the defendant being declared in the plaintiff's affidavit to be a non-resident. Process of attachment was immediately served, and the vessel arrested and held. She was thereupon bonded in the sum of \$20,000.

The attachment was not taken out under the general attachment law of Virginia, sec. 1, ch. 148, of the Code, before quoted, which gives the right of attaching the "estate" of defendant, but was taken out under the Vessel Lien Law, also before quoted.

The affidavit on which the attachment issues, sets out in terms that the injury complained of was done to plaintiff while a passenger by persons having charge of the said steamer *Arrowsmith*. The sheriff was not required by the process in the cause to levy the attachment upon any "estate" of the defendant to be found within the said county of Westmoreland, but was directed to attach "the said steamer *Arrowsmith*, with all her tackle, apparel and furniture, for the said amount of ten thousand dollars." Some days after the vessel was attached and bonded, an order of publication was made against the defendant company, as a non-resident, and in due course thereafter publication was made. The defendant was never served with process. On the 14th day of April, 1881, the defendant appeared in the state court by counsel, and on its petition the cause was removed into this court.

The defendant then filed here a demurrer, and alleges, as

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ground of demurrer, that the court has not jurisdiction of the cause in a proceeding at common law; this being essentially an admiralty cause, exclusively cognizable in an admiralty court.

J. A. Jones and George Walker, for plaintiff.

Robert M. Mayo, for defendant.

HUGHES, J. It is plain, as well from the affidavit on which the attachment was issued and the terms of the attachment, as from the concessions of plaintiff's counsel, that this is a proceeding under what is called "The Vessel Lien Law" (quoted in the foregoing statement of facts), and not under the foreign attachment law of Virginia. Since the decision of the United States supreme court in *Steamboat Company v. Chase*, 16 Wall., 522, common law suits are maintainable against ships of commerce for causes of action arising at common law. A state has power to annex to suits for such causes of action auxiliary remedies like foreign attachment for the purpose of subjecting property of non-residents to the payment of debts due her own citizens (*Pennoyer v. Neff*, 95 U. S., 714). A statute, therefore, which gives a right to attach any property of a non-resident to satisfy a judgment when obtained is valid; and, under such a law, creating a remedy by attachment against all the property of a non-resident, in an action for a common law tort already pending, a ship may, as the law stands at present under the rulings of the supreme court of the United States, be attached as part of the estate of the owner defendant. But can a state give a special lien upon a ship for a cause of action peculiarly of admiralty cognizance, and provide a remedy by attachment for its enforcement specifically and directly against the particular vessel as a debtor or offender? That is the question on which this case turns.

The supreme court has decided, in the cases of the *Moses Taylor*, 4 Wallace, 411; *The Hine v. Trevor*, 4 Wallace, 555, and *The Belfast*, 7 Wallace, 624, that states cannot give

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their courts the right to proceed against vessels *in rem*, for maritime causes of action. In consequence of those decisions and one of the district court of this district, already cited, the legislature of Virginia, by the act of 1878, merely struck out from the Vessel Lien Law, as it stands in section 5 in the 148th chapter of the code of 1878, the language which gave the right to proceed against the vessel by name for admiralty causes of action; re-enacted it, gave a lien *in ipsissimis verbis* on the specific vessel, and provided for its enforcement by an attachment directed specifically and exclusively against the vessel as debtor or tortfeasor. It is true that the suit must now be brought against owners, real or fictitious, by name; but in no other respect are the proceedings altered. Plainly, all this was a mere evasion, continued after the decisions referred to. The proceedings under the present law are substantially a libel *in rem* and *in personam* in admiralty.

The distinctive feature of an admiralty suit is, that the *privilegium* or right to pursue the particular ship, exists independently of possession, and exists only against the particular vessel on, or on account of, which the cause of action arose, which, in the eye of the admiralty law, is the real contracting debtor or offender, the real defendant.

It seems to me, therefore, that a statute which gives a lien on that specific vessel for that admiralty cause of action, and attempts to confer the right of enforcing it on a state court, comes within the reason of the cases above cited; even though the suit is in form against the owners nominally and the vessel really. The form cannot change the substance. In this case, for instance, the fact that the owners are named as defendants instead of the vessel, makes no real difference in the proceeding. They are not served personally with process. They can be brought into court only by an order of publication; precisely similar to that made in an admiralty cause, giving notice of seizure. The judgment, whilst in form against them personally, is yet enforced only by a sale of the vessel, or execution against the stipulators who stand for her. Can a suitor, then, be

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allowed to evade the decisions of the supreme court by merely altering the title of the case?

Where non-resident ship owners are defendants, the right to proceed in the state courts against their vessels in admiralty causes of action, if it existed, would be a peculiar hardship. Unlike admiralty courts, which are always open for business, most of the state circuit courts are held only twice a year, and last but a short time. Being strangers, non-residents cannot often give the release bonds with large penalties required by the state attachment laws. Their witnesses, being seamen, never remain long in one place, and hence their ships would be tied up idle for months, at a heavy expense, awaiting a distant term, with the probability of losing all their witnesses before the term begins. Continuances and new trials would make matters still worse. Besides all this, local juries are proverbially hostile to strangers, and it is natural that non-residents and mariners should be averse to running the hazard of their verdicts. Apprehensions of such delays and hazards are very prevalent among the masters and owners of shipping, and instances have come to my knowledge in which vessels have been attached in state courts for groundless claims; the suitors calculating that the vessels would pay the demand rather than be tied up for an indefinite period awaiting the result of litigation in an unfamiliar tribunal.

There are still stronger reasons why admiralty causes should not be tried by common law methods, and admiralty claims subjected to common law rules of decision. I do not think the framers of the judiciary act of 1789, by the clause in the ninth section, "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it," (now third clause of section 711 of the Revised Statutes of the United States), intended to provide that admiralty causes might be tried in common law courts in every case in which the subject of admiralty jurisdiction could be reached by common law process, and the issues of fact and law arising in them could be tried under the common law practice.

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The Constitution of the United States entitles the owners, navigators, employes and commercial creditors of ships, to have their rights determined by the rules of decision, and adjudicated by the expeditious methods obtaining in the admiralty courts; and the peculiar character, equities and priorities of these claims are such, that it is necessary, not only for the purposes of justice between man and man, but to the interests of commerce, that they should be so determined and adjudicated.

A ship is a thing that must be kept going, in order to subserve the objects for which she is built and employed.

To arrest and hold her idle is to destroy her life. She is essentially a voyager. The interests of all connected with her voyages require that the priorities of the claimants and creditors should be the reverse of those which are recognized by common law courts, as applicable to things on land. The seaman is paid first. The material man, who supplies or repairs the ship in equipping her for her voyage, is paid next; and, as between different material men, he who furnishes supplies or repairs at a later stage of the voyage, takes precedence of him who does so at an earlier stage. In general, the mortgagor, having a debt against the vessel, comes in behind other creditors holding maritime claims, and stands only in the shoes of the owner. Credit is given to the ship herself as the responsible debtor and a wanderer and stranger; the owner being in general, and in the first instance, unknown to the creditor, and ignored by the law. These are but a few of the rules of decision distinguishing the adjudications of the admiralty, from those of the common law courts.

Now, it is plain that in cases in which the rights of suitors depend upon the admiralty law, the common law, whose rules of decision are in a great class of cases violently the reverse of those obtaining in the admiralty courts, is incompetent to afford the remedies contemplated by the ninth section of the law of 1789.

In a large number of cases, an admiralty suit is in the nature of a creditors' bill in equity; in which the ship has to

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be sold, and the claims of creditors marshalled and adjusted according to priorities observed and respected in all the admiralty courts of the world, in respect to ships. Can it be pretended that a suit at common law, commenced by attachment, and order of publication, against a non-resident owner, in a jurisdiction in which the ship is a stranger, and the rest of its creditors non-resident, is one in which the common law practice, and the common law rules of decision, are competent to the ends of complete justice? The proposition would seem to be little less than preposterous.

Suppose there be claims of seamen, material men, salvors, ship's-husbands, and others, existing against the vessel which has been arrested in the present suit (and for all we can know from this proceeding, there are such claims), the claimants all having constitutional title to an adjudication of their rights in an admiralty proceeding, according to admiralty rules of decision; what would become of them in the present suit at common law, pending between no other possible parties than the plaintiff and the owner? The claims of the persons having primary rights in the vessel are not before the court, and cannot by any legal possibility, be brought here in the present suit. It is not sufficient to answer that judgment in this case would not reach this particular vessel which is bonded; for that is only to assert that by fortuitous circumstances this particular vessel has had the narrow chance to escape the injurious and unjust consequences of this sort of suit. Nor would it be sufficient, if this vessel had not been bonded, but were still in custody of the court, to assert that the sale of her under execution at common law would convey to the purchaser only such title as a common law court could give; and would leave her still subject, in the hands of her purchaser, to all outstanding maritime claims; for the vessel would have been in custody of the court awaiting the recurrence of rule days and terms, and the delays of plenary proceedings, for nearly two years since its arrest, during which her seamen would, in all probability, have been scattered to the ends

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of the earth, and the material men of other ports who had supplied her on short credit with things needful to keep her moving, would have been waiting in vain for payment. To have postponed the claims of those two classes of men for eighteen months and more, would have been a denial of justice. Plainly, the common law remedy, applying the rules of common law decision to ships and their creditors, cannot but be prejudicial to the great interests of commerce, and to the rights of all persons connected with the navigation of ships.

The judicial history of the United States proves that the admiralty law and the admiralty practice, are absolute necessities to the commerce of the country.

At one time, owing to a series of decisions rendered by the supreme court of the United States, all that very large portion of the Union not bordered upon or penetrated by tide-waters, was deprived of this law and practice; and the deprivation was felt so keenly, that very remarkable things occurred.

In a series of cases, amongst them the *Thomas Jefferson*, 10 Wheat., 428, and the *Orleans*, 11 Peters, 175, the supreme court held that the admiralty jurisdiction of the United States courts embraced only the tide-waters of the country and by so ruling, virtually excluded it from the regions watered by the great lakes of the North, and by the Mississippi river and its tributaries.

The need of this jurisdiction was in consequence so severely felt by the commerce of those great regions, that congress found it necessary to pass the act of February 26th, 1845, "extending the jurisdiction of the United States District courts to certain cases upon the lakes and the navigable waters connecting the same."

This law virtually erected the district courts of the United States, in districts bordering on the waters named, into *quasi* admiralty courts. It expressly provided that the practice and proceedings *in rem* obtaining in admiralty courts, should be employed in the district courts, in respect to vessels exceeding a certain tonnage; and that the maritime law and

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the rules of decision observed in admiralty courts should be applied to vessels navigating the lakes and waters connecting them.

This act of congress could of course have no operation in respect to vessels navigating interior waters other than those of the lakes and their connecting streams, and failed to reach the needs of the commerce of all the other waters of the Mississippi Valley.

This defect was supplied by the state legislation; all, or nearly all, of the states penetrated or bordered by those other waters, passing laws authorizing their own courts to adopt and employ, to a greater or less extent, the practice of admiralty courts, and to deal with the vessels navigating them according to admiralty rules of decision.

While these things were going on, the views of the supreme court of the United States in respect to the extent of the admiralty jurisdiction, underwent a change; and in the case of *The Genessee Chief*, 12 Howard, 457, that court reversed its former ruling and held that *navigability*, and not the *ebb and flow of the tide*, was the test of the presence of that jurisdiction. After this ruling, it followed as a logical consequence, that the court would also have to rule that the admiralty jurisdiction extended *proprio vigore* to the northern lakes and to the rivers of the Mississippi Valley; that it extended there by virtue of the Constitution of the Union, and not by virtue of the congressional act of February 26th, 1845, or of the statutes of the states relating to vessels, which have been mentioned. Moreover, that this jurisdiction was exclusively in the courts of the United States, and that all state legislation conferring the jurisdiction upon state courts was unconstitutional. All this, accordingly, that court has subsequently decided; as, for instance, in the cases of *The Magnolia*, 20 Howard, 296; *The Moses Taylor*, 4 Wallace, 411; *The Hine v. Trevor*, Id., 555; *The Belfast*, 7 Wallace, 624; *The Eagle*, 8 Wallace, 15; and *Ins. Co. v. Dunham*, 11 Wallace, 1.

This very cursory view of the course of legislation and adjudication on this subject, shows that the admiralty law

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and practice, that is to say, the admiralty jurisprudence, is a necessity to the commerce of the country; that it cannot be dispensed with in regard to vessels employed upon the public navigable waters of the United States; that the courts of the Union and of the several states are bound to regard navigators of, and all persons interested in, ships, either in the character of owners, employes, or creditors, as entitled to the benefit of that jurisprudence; and that any state legislation designed directly, specifically and particularly, to subject ships as such and as debtors or offenders, to common law procedure, and common law rules of decision, for maritime causes of action, is in necessary conflict with the constitutional provision and congressional legislation giving to the United States courts exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, and tends to work incalculable injustice to the classes interested in shipping.

Indeed, the necessity of resort to admiralty rules of decision in respect to things requiring constant outlays of labor and money in order to be rendered useful for the purposes for which they exist, has not limited itself to ships. It has recently extended itself to embrace railroads. The Supreme court of the United States, in the recent cases of *Fosdyck v. Schall*, 9 Otto, 235; *Hale v. Frost*, Id., 389, and other decisions, have found it necessary to relax the common law principles of priority among creditors, and to apply to railroads principles assimilated to those of the admiralty law.

In the former case, it said: "The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment and improvements, are permitted to accumulate in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided.

"In this way the daily and monthly expenses are kept from those to whom in equity they belong, and used to pay the mortgage debt." * * * * "Every railroad mort-

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gagee, in accepting his security, impliedly agrees that the current debts, made in the ordinary course of business, shall be paid from the current receipts, before he has any claim upon the income." * * * * "When a receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipments provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of the funds, would have been paid in the ordinary course of business."

Thus the tendency of modern jurisprudence is very strongly towards a departure from the rigid and inelastic tenets and methods of the common law, in respect at least to the instruments and instrumentalities of trade and commerce. And I think the time is not far distant when the supreme court of the United States will find it necessary to hold, that the attachment laws of states allowing attachments *in rem* to be served on the general estates of defendants in pending suits shall not be construed to embrace, in suits brought for causes of action clearly maritime, steamboats, ships and other vessels actually engaged in the carrying trade on the public navigable waters of the United States covered by the admiralty jurisdiction.

It only remains for me to notice a few of the cases cited by plaintiffs' counsel in their brief, touching, apparently, this very point. In the case of the *Steamboat Co. v. Chase*, 16 Wallace, 522, there were two questions: 1st. Whether a personal representative of an intestate (who had been run over and drowned by a large steamboat), could bring suit in admiralty for the tort; the general rule being that claims for tort die with the claimant, and there being a state statute in Rhode Island, where the accident occurred, giving the right of action in a common law proceeding to the representative of such an intestate. 2nd. If there were no right of action in admiralty, then the second question was

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whether, admiralty having no jurisdiction of the cause of action, a proceeding at common law in the state court, as this suit was, under the state statute, and an attachment of the steamboat under the general attachment law of the state, was an interference with the exclusive jurisdiction of the admiralty courts in maritime causes of action. The supreme court held that this suit could be maintained in the state court, and that the attachment of the vessel was valid. That case, it is obvious, differs essentially from the one at bar. In that case both parties were residents of Rhode Island.

In the case of *Leon v. Galceron*, 11 Wallace, 187, a state statute of Louisiana gave a right of attachment, called in the local nomenclature, "a writ of sequestration," in certain cases against the estate and property of a defendant, irrespectively of whether the plaintiff's claim was maritime or not. It was a statute similar in character to the general attachment law of Virginia, chap. 148, sec. 1, of the Code, which was quoted in the statement of facts prefixed to this opinion.

The plaintiffs were seamen, who sued for wages earned on board of a schooner of the defendant employed on the Mississippi river in Louisiana, all being residents of the state, and probably of the city of New Orleans, where the suit was brought. The action was *in personam* against a defendant who also was a resident of Louisiana; and the schooner was attached, on mesne process, under the general attachment law which has been described. It was stated by plaintiffs' counsel in his brief in the supreme court of the United States, to which the case was carried from the state courts, that "the writ of sequestration (used in Louisiana) has no analogy whatever with the admiralty process, as understood and defined by writers on admiralty law"; and he cites Art. 269, *et seq.*, of the Louisiana Code of Practice, which is not before me. The suit, therefore, was like an ordinary suit at common law between residents; in which, under a general attachment law, the property attached was a schooner of the defendant. The case, ap-

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parently, is a strong one for the plaintiff in the present suit; but it differs essentially from it in the particulars about to be named.

We are considering here a law of Virginia which, in its original form, gave a *privilegium* in admiralty and a proceeding *in rem* against a ship as such, for all maritime claims, although no suit *in personam* had been instituted, and irrespective of ownership. This law having been pronounced, in the respects indicated, unconstitutional, was then changed, but changed only to the extent of providing that the proceeding *in rem*, though still taken out against the ship as debtor or tort-feasor, should be "in a pending suit."

I do not think so slight an amendment has rectified the inherent illegality of the statute. I do not think a state statute, giving for a maritime cause of action, a proceeding *in rem* specifically against a ship as the debtor or offender, is valid in view of the third classification of causes in section 711, of the Revised Statutes of the United States, giving cognizance to the admiralty courts, exclusive of the state courts, "of all civil causes of maritime and admiralty jurisdiction." I think the suit must be dismissed for want of jurisdiction.

As to the proposition of plaintiff's counsel, that the defendant cannot raise the question of jurisdiction by demurrer, I have to say, that however that might be in respect to other defects of jurisdiction, yet when the nature of the action is such that the court is incompetent to try it, then no formal plea to the jurisdiction is necessary; and whenever on any pleading the court is brought to the knowledge of the absence of its jurisdiction of the case, the court may *ex mero motu*, or on simple motion of either party, dismiss the proceeding. Moreover, it is elementary law, that a demurrer brings the whole record before the court antecedent to the demurrer, and so, the demurrer in this case is equivalent to a motion to dismiss. The suit must be dismissed.

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United States District Court at Alexandria, April 2, 1882.

EX-PARTE ROBERT BALLINGER v. GEORGE NOWLAND.

Piracy is cognizable before the courts of the United States only when committed on waters outside of the criminal jurisdiction of state courts. The same of other crimes formerly cognizable in admiralty courts. Section 5370 of the Revised Statutes of the United States is controlled and limited by section 5828 of the same Title.

ON WRIT of Habeas Corpus.

The prisoners had taken forcible possession of some freshly printed newspapers that were on the way from Washington city to Alexandria, on a ferry boat, to be put in circulation in Alexandria; and had thrown the papers into the Potomac river.

Complaint of piracy was made against them before U. S. Commissioner Fowler, in Alexandria, who had committed them to jail. Whereupon this writ was sued out

Westel Willoughby, and District Attorney L. L. Lewis, represented the government.

Charles E. Stuart, F. L. Smith, S. G. Brent and Edmund Burke, appeared for the accused.

Edmund Burke stated the proceedings which had been taken before the commissioner and upon the petition for the writ of habeas corpus, and argued that as the warrant charged the offense to have been committed in the District of Columbia, and upon the Potomac river between Washington and Alexandria cities, the laws of the United States concerning piracy did not govern within that jurisdiction. Either the laws of the District or of Virginia extended there, and if any offense had been committed it was against these laws. But in point of fact no of

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fense had been done, or any law violated. The defendants were guiltless of the offense sought to be imputed to them, and were anxious and willing to meet, and would fearlessly invoke the bringing of a valid charge, and one that could be met under the forms of law in a court of justice. He asked that the prayer of the petitioners be granted and the accused discharged.

District Attorney Lewis said, that the only question in the case was that of jurisdiction, and argued against the motion to discharge the accused. He proceeded to show that there was no conflict between the section, 5370 upon which the warrant for the arrest of the men was based, and that of 5372, and said that the offense was not committed within the bounds of any county.

HUGHES, J. The prisoners are in jail on a charge of piracy, alleged to have been committed on one of the ferry boats plying between Washington and Alexandria, on the Potomac river, on tide water. The offense charged is the taking with violence certain property from a passenger on the steamer. The arrest is based upon section 5370 of the Revised Statutes of the United States, which makes robbery or murder in or upon a vessel on tide waters, piracy, and fixes upon such a crime the penalty of death. The prisoners are committed to jail here to await indictment in the District of Columbia.

Piracy was originally an offense known only to the admiralty and international law. Murder, robbery or depredation, committed in a general spirit of hostility to mankind, on the high seas, was called piracy. It was cognizable only by the admiralty court; but as pirates often invested havens, bays, rivers and inlets, and committed like offenses there, it became necessary for the nation whose jurisdiction was thus infested and violated, to declare similar acts, though committed on waters other than the high seas, to be piracy, and to make it cognizable by the local criminal courts. In this way arose the *statutory* crime of piracy.

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The Constitution of the United States gives to Congress power to establish admiralty courts, and to prescribe their jurisdiction. Congress has exercised this power only to the extent of conferring upon the admiralty courts jurisdiction in civil causes arising upon contract and tort. But it has given the admiralty courts no criminal jurisdiction, for the reason that the constitution guarantees a jury trial in criminal prosecutions, and juries are unknown to the admiralty law. Congress has vested criminal jurisdiction in the circuit and district courts of the United States, sitting as courts of common law. It has conferred upon those courts the cognizance of crimes committed on American vessels, on the high seas, and of crimes committed on vessels within the havens, bays and rivers affected by the tides—statutory piracy being among the crimes of which cognizance is thus given to the Federal courts. But by the crimes act of 1790, this jurisdiction over certain crimes committed within the tide-water inlets, bays, rivers, &c., was conferred by a section which limited it to such crimes as are committed "*out of the jurisdiction of any particular State.*" The criminal jurisdiction of the States is exercised by local courts whose powers do not extend beyond the body of the counties respectively. But the body of the county has always been held to embrace all waters that lie within the *fauces terræ*—that is to say, within lines supposed to be drawn from one utmost point of land to another utmost point. Over such waters, of course, the jurisdiction of the courts of the counties—that is to say, the jurisdiction of the States, extends. And, therefore, Congress, in giving jurisdiction to the national courts over certain crimes committed in bays, rivers, inlets, &c., affected by tides, as has been stated, in order to avoid a conflict of jurisdiction, and also for the reason that it was unnecessary to provide for the trial of crimes already cognizable by competent courts, gave jurisdiction to the federal courts over such of these crimes only as should be committed in waters outside of the jurisdiction of the States, outside the *fauces terræ*, outside the bodies of counties. So, likewise, in the crimes act of 1820,

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the section which relates to piracy, and from which the present section 5870 is taken, contains the following clause, viz.: "Provided that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offenses when committed within the body of a county," &c. In construing this statute the United States supreme court, in the case of *Jackalow*, 1 Black 484, held that the special verdict which was found was insufficient to warrant a judgment to be rendered upon it, because it failed to show whether or not the offense was committed outside of the jurisdiction of New York, beyond the forks of the land of the adjacent county. See also *United States v. Beavans*, 3 Wheat., 336.

And Mr. Bishop, the best writer on criminal law, remarks that "within the counties, the dominion of the state and the common law jurisdiction of their courts are, practically, almost as exclusive as if Congress had no constitutional authority in exceptional localities there."

This proviso, requiring that the piracy shall be committed in water outside the state jurisdiction, to be cognizable by U. S. courts, was dropped in transferring the section from the act of 1870 into the present Revised Statutes, where it stands as 5870, and that section, so unqualified in its tenor, is well calculated to mislead the examining and committing officers of the United States, as it did in this case.

But section 5870 is nevertheless, qualified by a provision of law equivalent to the proviso which the codifier dropped. Section 5870 stands in a Title of the Revised Statutes dealing with crimes, and is to be construed in connection with sec. 5328, standing in the beginning of that Title, which declares that "nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

Now I take it to be unquestionable that the crime of robbery, such as is set forth in the papers before me, is cognizable by the proper court of the District of Columbia for trying common law offenses. And therefore, that court having jurisdiction to try this offense of robbery, would

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have such jurisdiction "taken away" and "impaired," if a court of the United States should try this national offense of piracy.

The offense for which these prisoners are held, was not committed out of the jurisdiction of the District of Columbia; indeed, there are two local jurisdictions for certain purposes over the Potomac river, between Alexandria and Washington, that of Virginia as well as that of the District; and to try the offense of piracy in a national court would be to take away and impair two local jurisdictions, and doubly violate the inhibition of section 5328.

The proceeding under which the prisoners are held, having been without jurisdiction, their imprisonment is without law, and they must be discharged. I will sign an order of discharge.

United States District Court, District of Maryland,
April 12, 1882.

THE GAZELLE. (Two Cases.)

Where a vessel is chartered for a voyage to a safe Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lay and discharge afloat, lighterage, if any, to be at the expense and risk of the cargo, *held*, that the vessel could not be ordered to Aalborg, a Danish port, into which a vessel of her tonnage could never get by reason of her draught of water, and where she would have to discharge the whole of her cargo into lighters two miles out in the open water of the Kattegat, at a distance of over 17 miles from the port, and at an anchorage proved not to be reasonably safe for that purpose.

Held, that the fact being that the vessel could not get into the port, and that there was no anchorage near and customarily used in connection with it, where she could safely lay and discharge, it was the duty of the master to refuse to sign bills of lading purporting that he was going to deliver the cargo there, even with the clause inserted, "as near thereunto as the vessel can safely get, and always lay and discharge afloat."

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IN ADMIRALTY. Cross-libels.

A. Stirling, Jr., for owners of the ship.

S. T. Wallis and *H. C. Kennard*, for owners of cargo.

MORRIS, D. J. On June 16, 1881, the Norwegian bark *Gazelle*, 571 tons, being then in the port of Baltimore, was chartered by her master, under the usual grain and petroleum charter used in the Atlantic ports of the United States, to Messrs. Meisner, Ackerman & Co., of New York, for a voyage from the port of Baltimore to "a safe, direct Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lay and discharge afloat." The charterers agreed to furnish a full cargo of refined petroleum in customary barrels, and to pay freight at the rate of three shillings three pence per barrel. The lay days in Baltimore were to expire July 6th, and for discharging at port of discharge customary dispatch. Demurrage to be at the rate of 11 pounds sterling per day. The cargo to be received and delivered alongside the vessel within reach of her tackles. Lighterage, if any, always to be at the risk and expense of the cargo. The cargo, consisting of 3,181 barrels of refined petroleum, was put on board by the charterers, and on July 6th they tendered to the master of the *Gazelle* bills of lading, ordering the vessel to the port of Aalborg, on the eastern coast of Denmark. The master refused to sign the bills of lading, except with protest as to the port noted on them, upon the ground that Aalborg was a port into which, on account of shallow water on the bar, no vessel of the tonnage of the *Gazelle* could enter, even in ballast, and because, as he alleged, there was no anchorage near the port where he could, with safety, lay at anchor and discharge. He did say, after some discussion, that he would sign bills of lading containing the words "or as near thereunto as the vessel can safely get, and always lay and discharge afloat;" but subsequently, upon the charterers assenting to this clause being inserted

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in the bills of lading, he refused, saying, in effect, that as he knew the fact to be that there was no place near Aalborg where his vessel could safely lay and discharge, and as he knew beforehand that he would have to go to the nearest safe port, he would not sign any bills of lading which might, in any way, commit him to anything else. Neither party being willing to yield, the master libelled the cargo for demurrage and damages, and the charterers have libelled the ship for breach of the charter-party.

The charterers contend, firstly, that by the literal meaning of the language of the charter-party, as well as by the meaning which established usage and custom has uniformly given to it, the ship may, under it, be ordered to any safe commercial port within the range described in the charter-party, whether she can get into it or not, provided there is an anchorage near the port customarily used in connection with it, and where it is reasonably safe for the ship to lay and discharge; and they claim that there is such an anchorage used in connection with the port of Aalborg, in the Kattegat, off the bar at the entrance of the Limfiord. In the second place, they claim also that in Baltimore, New York and other Atlantic ports of the United States, by the established usage and custom of the trade with respect to similarly-worded charters, the contract is understood to be that if the port to which the ship is ordered is a port within the range described in the charter, and one where foreign commerce is carried on, the master, upon being ordered, is obliged to sign the bills of lading and sail for it; that if the master had intended to refuse to go to that port, the custom and usage require that he should have excluded and excepted it from the range of ports described in the charter, and, not having excepted it, he is obliged to sign the bills of lading and sail for it; that if, arriving off the port, he cannot enter it by reason of a permanent obstacle, and finds that he cannot safely lay at the customary anchorage and discharge, then he may make protest and go to the nearest port at which he can safely discharge.

As to this latter custom which the charterers have at-

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tempted to set up, I do not find that the proof adduced established a general acquiescence in respect to it. It is only quite recently that the questions have arisen which would give rise to its operation; and while it is shown that shippers and charterers have insisted in controversies with ship-masters that such was the contract and custom, and that ship-masters have generally, with some grumbling and hesitation, yielded and signed the bills of lading and set sail for the port objected to, it has not been shown that in any such case the port or anchorage objected to was in fact unsafe, nor that there was any general acquiescence by the owners or masters of ships in such a usage, or that they have accepted such a construction of the charter.

Moreover, I do not think that such a usage, if proved, and if admissible under this charter and otherwise unobjectionable, could be sustained as reasonable. If it were the fact that the ship could not, even in ballast, enter the port and remain there always afloat, and that there was no anchorage near the port where she could safely lay and discharge, and these facts were known to the master, and he was aware that he would from necessity have to go to another port to discharge, a custom which would compel him to sign bills of lading professing that he intended to deliver the cargo at such impossible port, "or as near thereunto as he could safely get," etc., and then make a pretence of an effort to go there, might very well suit the merchant who had purchased the cargo and chartered the ship on a foreign order, and was only interested to get the ship cleared and clean bills of lading into his hands, but it would be compelling the master to do a senseless act, calculated to mislead every one dealing with the bills of lading, and likely to give rise to expense, loss, and litigation.

I think there could be no such lawful custom. On the contrary, if the facts in any case be as above stated, and the master knows the facts, then I take it to be his plain duty to refuse to sign the bills of lading unless he chooses to do so with protest as to the port noted on them. It is the peculiar business of the ship-master to know what ports

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his vessels can enter, and what anchorages are safe, and signing the bills of lading without objection might result in committing him to the acceptance of the port as safe. *The Maggie Moore*, 7 Fed. Rep. 620; *Capper v. Wallace*, 5 Q. B. D., 166.

I come, then, to the first ground on which the charterers put their case, viz., that the language of the charter, "to a safe Danish port, or as near thereunto as she can safely get, and always lay and discharge afloat," and the obligation which, in all the Atlantic ports, it is uniformly understood and conceded arises from the use of that language in such a charter, requires that the vessel shall go to any safe commercial port, within the range described in the charter, provided there is customarily used in connection with the port a safe anchorage, where she can safely lay and discharge, even if, on account of her draught of water, she can never get into the port itself. To prove this custom, many experienced shipping merchants and ship-owners and brokers of New York and Baltimore were called as witnesses, and they testified that such is the well-understood signification uniformly given to this form of charter by all who use it. If the view I take of the facts of this case made it necessary for me to pass upon this point, I do not see how I could ignore a construction of a peculiar commercial contract, in daily use in important transactions, which is shown to be acquiesced in and acted upon by all those who use it. *Gracie v. Ins. Co.*, 8 Cranch, 88; *Renner v. Bank of Columbia*, 9 Wheat., 588. This construction does not, to my mind, conflict with or do violence to the language of the contract, and I cannot see that any one of its terms would become inconsistent if the full signification claimed to be given to it by the custom were written out in the contract itself.

I am aware that in the court of appeal of England, in the case of *The Alhambra*, L. R., 6 P. D., 68, in a controversy arising under a similar charter, that learned court refused to so interpret this language; but the custom here proved was not set up in that case, and there was no attempt to

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show the signification in which the terms of these charters are received and acted upon by those persons who are in the daily practice of signing them. The custom relied upon in that case was a custom of the port to which the ship was ordered, and the court held that a local custom of a port to which the ship might chance to be ordered was not admissible to construe the charter-party. I cannot but think that if the custom here set up had been proved in that case it would have been admitted.

But the claimants of the ship contend in this case that even if it be granted that the charter-party has the meaning which under the custom is claimed for it, still the master was justified in refusing to go to Aalborg or to sign bills of lading agreeing to deliver the cargo there.

The port and town of Aalborg is situated in Jutland, on the south bank of the Limfiord, about 17 miles from its mouth at the Kattegat. The waters of the Limfiord are deep, but at its mouth there is a bar some 2,000 feet wide, on which there is ordinarily not over 10 feet of water, and not usually more than 11 feet at the spring tides. Consequently, although from time immemorial there has been a considerable commerce carried on with the port, only vessels of very small draught can get up to it. Off the mouth of the Limfiord, outside the bar, there is no sheltered bay nor any indentation in the coast, but the coast line is a nearly straight north and south line. Vessels of the size of the *Gazelle*, which undertake to discharge their cargoes there, do so anchored out in the Kattegat, about two miles from the bar, in water about six fathoms deep. There they find a sandy bottom, affording fairly good holding ground, and a growth of sea-weed which is said to have a tendency to keep the water smooth. The vessels which do business with the port are usually of small draught, able to cross the bar when loaded, and there are some steamers of larger tonnage which trade regularly between Aalborg and English ports. These latter have lighters which they take in tow going out, receiving from them part of their cargo when over the bar, and in returning discharge into them suffi-

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ciently to lighten to 10 feet, and then tow the lighters in with them. Since 1876 there have been cargoes of grain and petroleum exported from the United States to Aalborg—as far as known, some 31 cargoes in all. Many of these were in vessels of such size as to be able to get in over the bar after lightering a reasonable amount, and some two or three of larger size discharged their whole cargo outside, without accident or damage.

There were called as witnesses on behalf of the *Gazelle* a number of Norwegian ship-masters familiar with the navigation of the Kattegat, and they testify that it is well known to be a stormy, dangerous sea, liable at all seasons of the year to sudden and violent winds from all quarters; that it is difficult for vessels to escape from storms there because of the shoals and intricacies of the channels, the constant danger of being driven ashore, and the lack of harbors of refuge, so that masters, when they can, often prefer to run out into the open ocean to escape a storm rather than risk encountering it in the Kattegat. They state that a vessel lying at anchor off the mouth of the Limfjord would not be sheltered from any winds except from the west or land side, and in case of a wind springing up from any other quarter sufficiently strong to cause the ship to part her cables or drag her anchors, she could not make her escape, and would have to go ashore; that no mariner in the Kattegat seeking shelter would ever think of anchoring off the Limfjord as a place of safety; that there are not to be found at the place any of the elements which constitute a safe anchorage, except the one fact that the water deepens very gradually out from the bar, and the proper depth for anchoring can be found with a bottom affording moderately good holding; and, further, they show that there is no port of refuge where such a vessel could get protection nearer than Frederickshaven, distant about 25 miles to the north, or Aarhus, distant over 50 miles to the south.

Without doubt, in the summer months, and about the time when the *Gazelle* might have been expected to have

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completed her voyage, storms are less frequent and less violent, and some few vessels of her size are shown to have discharged their cargoes at that season without accident. The masters of two vessels which have done so were examined. One of them says that he went there, having signed the bill of lading under protest, and only consented to discharge at anchor off the Limfiord upon obtaining an agreement with the consignee for additional compensation. He testifies that with the most favorable weather, and during the very best part of the summer, working often at night and on Sundays, he was three weeks discharging a cargo of petroleum. He asserts the anchorage to be unsafe at all seasons of the year, and thinks a vessel would run less risk anchored in the middle of the Kattegat, where she would have more room to maneuver in case she had to seek refuge.

It is shown by these witnesses that the discharging of the cargo is necessarily slow, and liable to interruptions. The so-called lighters are small sea-going sail-vessels which ply between the ship and the port, which is upwards of 17 miles distant up the Limfiord, and if the water is rough they cannot lie along-side the ship. If any accident happens to the ship there is no port nearer than Arhus or Fredrickshaven where she could be repaired, and the ballast which she needs before she can proceed to sea after discharging her cargo must also be lightered out to her as the cargo is taken away.

The consideration suggested by this testimony, and the weight of the opinions of master mariners who have had full opportunities of knowing the facts and forming sensible judgment, have convinced me of what I think any one, without the assistance of experts, would be inclined to suppose, viz.: that an open anchorage two miles off from a straight coast in a stormy northern sea, with no sheltered port or roadstead near, to which, in case of threatened danger, a ship could resort for refuge, could not be an anchorage where a vessel could safely lay and discharge her whole cargo, within the meaning of this charter-party.

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In claiming that the master should have excepted and excluded Aalborg before he signed the charter-party, if he did not consider the anchorage a reasonably safe one, the charterers have not the benefit of whatever force there might, in a proper case, be claimed for that position, if there had been a long-continued and generally-known practice of large vessels making Atlantic voyages to use this anchorage, and it had been shown to have become a well-known roadstead, used in connection with a well-known commercial port, to which a vessel under such a charter might reasonably expect to be ordered.

The master of the *Gazelle*, who, since he has been in command of that vessel, has made seventeen voyages from Baltimore and three from New York to British and continental ports with grain, and who is a Norwegian and familiar with Danish ports, swears that he had never known of Aalborg as a port to which a vessel of the size of the *Gazelle* could be ordered under such a charter, and that it never occurred to him that he could be ordered there.

No doubt there are commercial ports and roadsteads to which there are objections as places of safety, but which, having been more or less improved by artificial protections, and having, from the force of circumstances, become places of large commerce, have come to be well known as ports to which large vessels in great numbers do go. As to such a port or roadstead, it might, in a proper case, be said that long usage, the course of commerce, and the continued acquiescence of ship-owners, had estopped them from now saying that such an objectionable port or roadstead is not safe, and under such circumstances it might well be said that if the ship-owner did not intend his vessel to go there, the charterers might require to be warned of it by a special exception in the charter-party.

It is plain, I think, that Aalborg and the anchorage off the Limfiord does not come within that class.

Before the great increase in the exportation of grain and petroleum, the ports to which vessels were sent from the United States were not great in numbers, and were well

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known; but increasing trade and facilities for internal transportation have opened many new ports in all parts of the world, to which vessels are now sent more or less frequently. Aalborg is one of the ports to which this commerce is new. It was commenced in 1876, and since then, in five years only, some 31 ships are known to have gone there from the United States. Of these some were under charters in which that port was specially named and agreed to, and a special rate of freight paid, and almost all were vessels of such size that a reasonable amount of lightering enabled them to get over the bar and up to the port.

It has been also urged on behalf of the charterers that the master of the *Gazelle* having, after this controversy had arisen, proposed to the agents of the charterers to sign the bills of lading, provided the words "or as near thereunto as she can safely get, and always lay and discharge afloat," were interlined, and their agents, after only sufficient delay to communicate with the charterers, having agreed to accept the bills of lading so amended, that this was a compromise, and constituted a new agreement from which the master could not recede. But to my mind this was not a compromise. The bills of lading, before the proposed amendment, expressed that they were subject to all the conditions of the charter-party, and the interlineation was merely putting there a portion of the very language of the charter. Nothing was done, in consequence of the proposition of the master, which in the slightest way altered the position of either party. The master seems to have been persuaded that the interlineation would be sufficient to call attention to the fact that he objected to the port, and could not go there, but subsequently he concluded that as he knew he could not safely undertake to deliver the cargo at the port, nor near it, he ought not to sign a bill of lading purporting that he was going to attempt it. In this I think he was right.

In my judgment the libel filed by the charterers must be dismissed, and there must be a decree in favor of the owners of the ship.

Syllabus.

*United States District Court, Eastern District of Virginia,
at Richmond, April 20, 1882.*

J. B. EWAN, MASTER OF SCHOONER SARAH SCHUBERT,
v. THE TREDEGAR COMPANY OF RICHMOND.

- * Although the consignee, and not the ship, is responsible for delay in unloading caused by the crowded condition of the dock; yet, where the contract is, that the ship shall be at the usual place of unloading before she gives notice of arrival, and the evidence shows that the public dock is the usual place of unloading, and there is nothing to show that the dock was too crowded to allow the ship to moor at it, the ship cannot claim demurrage for delay caused by her failure to go promptly to the dock after her arrival in the harbor.

IN ADMIRALTY. Libel for Demurrage.

Wyndham R. Meredith, for libellant.

Charles S. Stringfellow, for respondent.

The harbor of Richmond is the bed of the James river before Rocketts; which latter is below the falls, and about a mile below the business centre of the city. The harbor being narrow and contracted, a dock has been constructed some twenty or more feet above the level of the harbor, from Rocketts into that part of the city in which its heavy business centres, and most of the coal and heavy articles of commerce shipped from or to Richmond, are loaded or unloaded on the dock.

Across the harbor at Rocketts, and on the opposite side of the James river from Richmond, are the wharves of the Richmond and Danville Railroad Company, which are chiefly used for loading and unloading coal, and are the property of the railroad company.

The schooner Schubert sailed from South Amboy, New Jersey, for Richmond, with 284 bushels of coal for the Tredegar Company, under a bill of lading which contained the

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stipulation used at Philadelphia in what is called the New Bill of Lading, and which is as follows: "Twenty-four hours after the arrival at the port of destination, and notice thereof to the consignee named there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every hundred tons thereof; after which the cargo, consignee, or assignee, shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of the cargo, as per this Bill of lading, for each and every day's detention, and *pro rata* for parts and portions of a day, beyond the days above specified, until the cargo is fully discharged; which freight and demurrage shall constitute a lien upon said cargo."

Although the Schubert arrived on the 15th, the cargo on the schooner was not discharged until two o'clock, P. M., on the 22d day of November, 1881. The consignee settled satisfactorily for the freight, and this libel was brought for three and a quarter days' demurrage.

The master claimed to have notified the consignee of his arrival on the morning of the 16th by telephone through a ship-broker, who however, was not called to testify to the fact; and the consignee's agent positively denied receiving such notice. The master went in person to the works of the consignee on the morning of the 17th, and the agent of the consignee testified that this was the first notice which he or any officer of the defendant company received of the schooner's arrival.

The questions in the case were, whether notice of arrival could be given before the schooner was in dock; and whether there was notice before the morning of the 17th.

HUGHES, J. It appears from the evidence in this case that the schooner arrived at Richmond on the night of the 15th November, 1881, and went across to the Richmond and Danville railroad wharves.

Her engagement was to notify the consignee of her arrival; but there is no proof that the notice was received by

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the respondent until the forenoon of the 17th. The allegation in the libel that notice of arrival was given by telephone on the 16th is not proved.

The schooner was bound by contract to be not merely in the harbor of Richmond, but at the usual place of unloading there. In the present instance she was bound to be in the dock at Richmond, that being the usual place of unloading. 1 Parsons, Sh. and Ad., 313, n. 1, and Abbott on Sh. Eng. ed. 1881, p. 243, n. o., and p. 244, notes a. b. c.

If she was prevented after getting into the dock, from securing a fit place for discharging her cargo, by any cause over which she had no control, then the lay-days occasioned by the crowded condition of the dock would have been chargeable to the consignee. The consignee, not the ship, is answerable for delay from the crowded condition of the harbor.

But there does not seem to have been any delay in this case from this cause. The schooner came in to the dock about 3 P. M., on the 17th, and the unloading began the next morning at 8 A. M., that is to say, within 24 hours after arrival and notice to consignee; for, supposing that notice was given on the morning of the 17th, the consignee was not bound to commence unloading within the 24 hours recognized by the contract.

The unloading seems to have been delayed a day and a fraction of a day beyond the period provided for in the contract. The weight of evidence is mostly in favor of the proposition that this delay was not caused by an insufficiency of carts provided by the consignee to receive the coal, but was caused by the coal being delivered from one only of the two hatches of the schooner, and not from both hatches. This was the fault of the schooner and not of the consignee.

I do not think the schooner is entitled to recover demurrage in this case, and the libel must be dismissed with costs.

*United States Circuit Court, District of South Carolina,
at Charleston, 6th May, 1882.*

THE UNITED STATES v. ONE RAFT OF TIMBER.

- *1. The penalty imposed by section 4234 of the U. S. Rev. Stats., for failure of vessels or water craft to carry lights, applies to all classes of vessels and water craft mentioned in section 4233; and hence rafts may be proceeded against under this section for such failure by a libel of information and are liable to the penalty therein prescribed.
2. But such a libel must aver the seizure and place of seizure.

APPEAL in admiralty from the District Court.

This was an action commenced by libel in the United States district court for South Carolina, to determine whether rafts or flats not carrying lights at night were subject under the statutes of the United States to any penalty.

The district court, Bryan, J., presiding, decided "that although there is statutory requisition that rafts must carry lights, yet congress has not provided any penalty now existing, which can be enforced against a raft by reason of not carrying lights."

The demurrer was sustained and the libel dismissed.

An appeal was taken to the circuit court.

A. T. Smythe, for libellant.

Bryan & Bryan, for respondent.

The decree of the circuit court was delivered by Bond, circuit judge, as follows:

"This case comes upon appeal from the district court sitting in admiralty. The libel alleges that under the Revised Statutes of the United States, rafts and other water craft when anchored in or near the channel of any river or

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bay shall carry one or more good white lights, in such manner as the board of supervisors might prescribe, and that upon a failure so to do are liable to pay to the United States the sum of \$200, for the payment of which, such crafts may be seized upon and proceeded against summarily by way of libel. It further alleges that the raft in question, on the night of the 27th day of January, 1880, while navigating Wappo Cut, a bay or river of the United States, in the district of South Carolina, by hand power and sail and by the current of the river, and being anchored or moored in the channel of said bay or river, failed to carry such lights as above provided. The libel therefore prays the ordinary process, and that the raft be decreed liable to the said penalty and be sold to pay the same.

The answer, which is in the nature of a demurrer, raises the legal objection that there is no provision of the law subjecting rafts to the penalty claimed.

The district court sustained the demurrer and rendered a decree dismissing the libel on this ground, holding that although there is statutory requisition that rafts must carry lights, yet congress has not provided any penalty, now existing, which can be enforced against a raft by reason of not carrying lights.

The question now before this court is therefore purely one of law.

Section 4233 of the Revised Statutes of the United States prescribes certain rules for the navigation of vessels of the navy and mercantile marine of the United States.

Rule 12 of this section requires that coal boats, trading boats * * * * rafts or other water craft *navigating* any bay, harbor or river, by hand power, sail or by the current of the river, or which shall be anchored or moored in or near the channel or fair way of any bay, harbor or river, shall carry one or more good white lights, which shall be placed in such manner as shall be prescribed by the board of supervisory inspectors of steam vessels.

Section 4284 provides that collectors * * * * shall require all sail vessels to be furnished with proper signal

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lights, and every such vessel shall show a torch to a steam vessel approaching at night.

The same section then goes on to provide that "Every such vessel that shall be *navigated*, without complying with the provisions of this and the preceding section, shall be liable to a penalty of two hundred dollars; one-half to go to the informer; for which sum the vessel so *navigated* shall be liable, and may be seized and proceeded against by way of libel, in any district court of the United States having jurisdiction of the offence."

There is no penalty other than the above prescribed for the violation of any or all of the various and important rules contained in the preceding section. Unless therefore this clause applies, these rules may be violated with perfect impunity.

It is contended by the defense that this penalty is by a proper construction of the words limited only to sailing vessels, being the class immediately before referred to; and that this is further made out from the side notes to the section, and from an examination of the former acts of which this section formed a part, before the revision of the United States Statutes was made, and that, therefore, there is no such remedy as a libel *in rem* against a raft, upon a seizure given by the statute.

In this view the court does not concur; although an examination of the former acts is often of great assistance, still they are not controlling. The court must be governed by the Revised Statutes as they are enacted by congress, not by the former acts which that revision replaces. And although the side notes are a great assistance in enabling a more ready reference to the Statutes, still it is to the text of the Statutes and not to these marginal notes that we must look for the law.

Statutes must be so construed as to carry out the intention of the legislature in passing them. And what this intention is must always be more or less a matter of inquiry.

These *navigation* laws are not, strictly speaking, penal laws. But even if they were, "we are bound to interpret

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them according to the manifest import of the words and to hold all cases which are within the words, and the mischiefs to be within the remedial influence of the statute." We must "adopt the sense of the words which harmonize best with the context and promotes in the fullest manner the apparent policy and objects of the legislature." *United States v. Winn*, 3 Sum., 212; *The Enterprise*, 1 Paine, 33; *The Industry*, 1 Gall., 117.

This chapter in the Revised Statutes is on the subject of "*Navigation*." Section 4283 prescribes rules for the *navigation* of vessels of all kinds and characters.

The importance of these rules is inestimable and undisputed—upon their rigid enforcement depends the preservation of both life and property. In the same rule in very many instances like provision is made both for sail vessels and vessels of other kinds. A violation of the rule by any other kind of vessel is as equally fraught with danger, as if such a violation were by a sail vessel. In many instances the risk and danger would be greater. And yet to adopt the argument of the defense would be to hold that congress had been guilty of class legislation: that it has provided a penalty for the violation of the identical rule by sail vessels, while a similar violation of the identical rule by a vessel of a different class, is unnoticed and goes unpunished: that the object in view was not to enforce by proper penalties rules necessary to the safety of the commercial world and to enforce them upon all vessels alike, but merely to single out one class of vessels as alone liable to punishment for this infringement.

This cannot prevail—congress was dealing with a general class, and with a general subject. It was providing general rules and it provided a general penalty.

As already stated the subject of the chapter is "*Navigation*."

The first sentence of section 4283 states that the rules are to govern "*the navigation of vessels*." And the penal clause provides that "Every such vessel, that shall be *navigated* without complying with the provisions" of such section shall be subject to the penalty.

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Manifestly it includes all vessels, to govern the navigation of which these rules were adopted.

If this sentence stood by itself as a distinct section; or if sections 4233 and 4234 were united as one section there could be no shadow of question. Without the change of a single word or the addition of a single syllable it would undoubtedly embrace every class of vessel referred to. And therefore the only confusion arises from this sentence in the sub-division of the statutes being put as a part of section 4234. "But," to adopt the appropriate words of Judge Story in a similar case, "what possible difference can it make in the construction of a statute that there is a sub-division into sections?"

Suppose this act contained no such sub-division, might it not be read in precisely the same manner now, as it would then read and be interpreted in the same way? Clearly it might; for statutes are construed by the import of the words and not by the mere division into sections, or periods, or sentences. The intention of the legislature does not break itself into sections. It is to be drawn from the entire corpus of this act and not from a single passage."

"Where," (as here), "a clause is found in one section, which in its general language and import, is equally as applicable to the other sections and provisions of the same act, as it is to the very section, in which it is found;" "where," (as here), "the main object of those sections and the true intent and policy of the act will be best promoted by reading it as applicable to all those sections; and where," (as here), "public mischiefs equally within the scope of the statute would be thereby prevented, and upon a different construction those mischiefs would be left without redress, there certainly is very strong ground to say that the clause ought to be so construed as to suppress the mischiefs, and not promote and protect them; that, as its language is appropriate, so it shall be construed as intended to include them. Where the public mischief is the same, and the words are sufficient to cover all the cases, it would be against all just rules of interpretation to *confine* the lan-

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guage to one case only." *The Schooner Harriett*, 1 Story, 256.

The decree of the district court is for these reasons overruled and the penalty imposed by section 4284 with the mode of enforcement, is held to be applicable to all classes of vessels and water craft mentioned in section 4283.

It is further objected however by the defense that the court has no jurisdiction in this case, because being a cause of seizure, there is no averment of seizure and place of seizure in the libel. That the libel must therefore be dismissed upon this ground. This objection is raised for the first time in this court. An examination of the pleadings shows that no such averments are there made.

It is settled law that in cases of seizure the jurisdiction depends upon the fact and place of seizure; not upon the place where the offense was committed, and that such seizure must be subsisting at the time the libel is filed. And this objection to the proceeding can be taken at any stage of the proceedings. *The Ann*, 9 Cr., 289; *The Fideliter*, 1 Abb., 577.

As it nowhere appears in the record that any seizure was made before the libel was filed or that there was any subsisting seizure at that time this objection must be sustained.

It is therefore adjudged and decreed,

That the appeal be dismissed upon the ground that no seizure was made prior to the filing of the libel.

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United States District Court, at Norfolk, June 8th, 1882.

EDWARD O'BRIEN *v.* 1614 BAGS OF GUANO.

- *1. A charterer who cancels a charter-party, under an option accorded him of so doing in the event of the failure of the ship to arrive at the port of destination by a certain day, cannot, after such cancellation, claim the benefit of a provision of that charter-party agreeing to carry free the cargo from the starting port to the port of destination; but must pay freight on such cargo. Having elected to cancel the contract, he can no longer claim under it.
2. Damages occasioned to the charterer by the late arrival of the ship, cannot be set off in admiralty against the freight.

IN ADMIRALTY.

Sharp & Hughes, for libellant.

Walke & Old, for claimant.

HUGHES, J. This is a libel on 1614 bags, part of a cargo of 1000 tons of guano and 287 tons of cotton ties, brought by the ship John Bryce from Liverpool to Norfolk. It was taken out on this residue of cargo while still on the ship, for the sum of \$1561.88, claimed to be due to the ship for freight on the said cargo.

The libel is founded on a charter-party entered into in the city of Norfolk, on the 22d of November, 1881, between Lamb & Co., agents of the ship John Bryce, and the Seaboard Cotton Compress Company of Norfolk, which stipulated for "a voyage from the port of Liverpool, England, to Norfolk, Va., and then direct to Liverpool, England," and which recites that the ship was then lying in the harbor of Liverpool.

On the part of the vessel, it provides among other things that the ship shall bring one thousand tons of salt or (and) guano free from Liverpool to Norfolk, to be unloaded at charterers' expense; with charterers' option of three hun-

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dred tons additional at five shillings per ton. And in adopting, by reference to, the stipulations of a previous charter for another ship of the same owner, the O'Brien, it stipulates in effect that if the vessel should not arrive at Norfolk by the 16th of February, 1882, and "prepare for entering on this charter," the charterers should have option of cancelling the same. No other consequence in the nature of a penalty or forfeiture is provided in the charter for the event of the ship's default in arriving at Norfolk by the 16th of February.

There is also a provision that "this charter shall commence when the vessel is ready to receive her cargo at the place of loading, and notice thereof is given" to the charterers or their agent.

On the part of the charterers, it is stipulated amongst other things that they will "furnish the said vessel a full and entire cargo of cotton or (and) other lawful merchandise from Norfolk; and that they will pay thirty shillings per registered ton for freight on the shipment to Liverpool."

It was shown in the evidence that the ship John Bryce had but recently arrived in Liverpool with a cargo when this charter-party was entered into; that, after unloading, she had to be put upon a dry-dock to repair the copper upon her bottom, which produced delay; that the ship did not set sail from Liverpool until the 18th of January, 1882; that the weather was bad during the voyage, from which cause she was at sea seventy-six days; and that she did not arrive at Norfolk until the 4th of April, or fifty-seven days after the time fixed in the charter-party for her being in readiness to take on cargo. It was proved that the ordinary time of passage varied from 25 to 50 days; and that in leaving Liverpool on the 18th of January she had but 29 days within which to make the voyage to Norfolk. It was not proved or contended that the delay of the ship in reaching Norfolk was owing to fault on her part. It was proved that the ordinary rate of freight from Liverpool to Norfolk is ten shillings per ton.

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The ship took on at Liverpool 1000 tons of guano and 287 tons of cotton ties. The bill of lading for the guano recites that the cargo was to be delivered to the order of the shippers in Liverpool, or their assignees, "they paying freight for the said goods at the rate of freight free and all other conditions as per charter-party"; and is dated at Liverpool on the 7th of January, 1882.

It appears from the evidence that thirty shillings was the maximum freight paid for cotton from Norfolk to Liverpool; and that to vessels chartered while in Liverpool, less rates (29 or 28 shillings) had been obtained last fall and winter; that to vessels chartered in Norfolk freights were always less than when chartered in Liverpool; that during last winter as low as 26 shillings had been paid to such vessels, and that after the 16th of February last, the charterers, respondents in this case, had in no case paid to such vessels as much as 30 shillings for freights from Norfolk to Liverpool.

The ship, not having arrived at Norfolk by the 16th of February, 1882, the charterers exercised the privilege which they had reserved, and canceled the charter. They made tender of four shillings a ton as freight on the ties, and since the filing of this libel have deposited in the registry of the court the sum of \$279.26 as the net amount admitted to be due on that account, together with the costs of this proceeding which had accrued up to the time of the deposit. The libellant claims at the rate of five shillings per ton for the whole cargo. The respondent claims that notwithstanding the cancellation of the charter, the libellant is still bound to deliver the guano free of freight. It is conceded that there has been no transfer of the ownership of the cargo since it was shipped, and that it is still the property of the charterers. There is no pretense that there was any fall in the price of guano between the 16th of February and the 4th of April, 1882. It was claimed and proved, however, that the guano arrived too late to be used by the truck farmers in the vicinity of Norfolk, on the crops of the present year.

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The single question in this case is whether, after cancelling the charter as to the voyage from Norfolk to Liverpool, the charterers can claim that its provision requiring the 1000 tons of guano from Liverpool to Norfolk to be brought *free*, still binds the ship. It is plain, and will not be contested, that the inducement which led the owner of the ship to bring the guano to Norfolk free, was the stipulation of the charterers to pay the high price of 30 shillings per ton for the "full and entire cargo," which the ship was to receive at Norfolk. The charterers, by cancelling the charter, deprived the ship of the full cargo and the high freight, for which she came to Norfolk. The inducement which brought the ship here being thus withheld, was she still bound to render, without compensation, the service which she had promised in consideration of the expected cargo and freight?

If this was her bargain, then she must stand by her bargain. But there is nothing in the charter-party which expressly, or by implication, settles this question one way or the other. What was the effect, then, of the cancellation of the charter-party?

It in terms provided for "a voyage from Liverpool to Norfolk, and thence direct to Liverpool"; treating as an entirety the trip both ways.

The charter, in terms, provides that it is to "commence when the vessel is ready to receive her cargo at the place of loading, and notice given the charterers," which, in this case, as 1287 tons of cargo were first received on board the ship at Liverpool, commenced at Liverpool. In this respect this charter differed from that of the ship O'Brien, to which it refers; which latter, in terms, provided only for a voyage "from Norfolk to Liverpool." The cancellation of the O'Brien's charter, if it had been cancelled, might probably with reason have been construed as affecting only the voyage from this port. But the present charter treats, in terms, as one voyage, the round trip *from* Liverpool back to Liverpool. So that, to cancel it in Norfolk, when it was already nearly half executed, would have a different effect

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from that which a cancellation might have had in the O'Brien case.

This charter-party gave the right to the charterers, in case of the ship's default, to cancel at Norfolk "the charter." It did not give the right to cancel a part of the charter and retain the rest. It did not impose any forfeiture, or penalty, or duty, or service on the ship, for default in arriving at Norfolk by the 16th of February, except alone that it authorized the charterers to cancel the instrument in its entirety.

If the parties had intended a further forfeiture or consequence they ought to have expressed it in the instrument. When parties to an instrument take pains to insert one provision as a result of a default, that fact excludes all implications as to other provisions.

The maxim, *expressio unius est exclusio alterius*, is the leading maxim in the construction of all writings, whether contracts, deeds or statutes. The cancellation of the charter-party was therefore an abrogation of every stipulation it contained, whether in favor of one party to it or the other.

The charterers were no longer bound to furnish a cargo, or to pay 80 shillings per ton of freight to the ship; and the ship was no longer bound, *quoad* the charterers, to transport the guano free. The cancellation of the charter gave to the ship the right to claim freight upon the guano on the basis of *quantum meruit*.

Mention was made, at bar, of the expression employed in the bill of lading, holding out that the guano was shipped "freight free, all other conditions as her charter-party." If there had been an assignment of the guano by the consignees, and, on its arrival in port, these other *bona fide* owners had claimed it of the ship "freight free," a strong equity might have been presented in behalf of these third persons. But even they were put on their guard by the express reference to the charter in the bill of lading; and even they could not have claimed, in contravention of the charter, release from the freight against the ship her-

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self; however conclusive their claim may have been against the consignees from whom they had received an assignment of the bill of lading.

As against even *bona fide* assignees of the bill of lading, the ship could hold the cargo for the freight, if entitled to hold it against the charterers; for it was but the other day decided by the United States supreme court, in *Pollard and Pettus v. Vinton*, 4 Transcript Reports, 320, that a bill of lading differs essentially from a bill of exchange or promissory note, in the hands of a third party. The court said that notwithstanding a bill of lading "is designed to pass from hand to hand with or without endorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all* inquiry into the transaction in which it originated because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

"It is an instrument of a two-fold character, at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel; in the latter, it is a contract to safely carry and deliver." See also *Fechtenburg & Co. v. The Bark Woodland*, 3 Transcript Reports, 198.

Therefore, even if there had been no reference on the face of the bill of lading in this instance, to the charter-party, the transfer of the bill and of the property in the cargo to a third party by the charterers, would not have defeated the rights of the ship in the cargo. It could libel the cargo *in rem* for the freight as long as it held custody of it; and only in case it had delivered the cargo to the assignee of the bill of lading, would it have lost the right to libel *in rem*. Even after such delivery it would have had the right to proceed in admiralty by libel *in personam* against the charterers in their character as the charterers in this charter-party.

Syllabus.

On the whole case, I think that the libellant is entitled to recover a fair freight for the guano. The evidence shows that that would have been ten shillings per ton. In a spirit of compromise, he claims only five shillings, and that amount will be decreed.

Under the charter, the charterers stipulated that the unloading in Norfolk should be at their own expense. Their claim in their answer of the right to deduct this expense is negatived by their own stipulation. Aside from this agreement, however, I think a freight of five shillings per ton, net, should be allowed the libellant, and I will so decree.

I hardly need to add, that if the charterers have experienced any loss from the late arrival of the guano which was brought by this ship, their damages cannot be the subject of a set-off in this proceeding; but must be sued for in another proceeding, if sued for at all. Set-off is a statutory right, unknown to admiralty, except as a credit on the particular transaction which is the subject of the libel.

[NOTE.—That a contract cannot be binding on one party and not on the other, and that it must be canceled *in toto* or not at all. See *The Africa*, 1 Spink's Adm., at p. 302; *Raymond v. Bearnard*, 12 Johns. N. Y., 274.]

*United States District Court, Eastern District of Virginia,
at Norfolk, August 5, 1882.*

W. H. FRENCH v. THE STEAMER EXCELSIOR.

- * 1. A service rendered by a professional wrecker in getting afloat a large steamer aground on Hampton Bar, in Hampton Roads, and too firmly aground to come off unassisted, the means used being a wrecking schooner, a tug, an anchor and cable, a hoisting engine, and a gang of wreckers, the time occupied in actual work being only a few hours, and the entire time during which the employment of the wreckers

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lasted being less than a day, the weather being good, is a salvage service.

2. In such a case, \$700 salvage was awarded, the value of the vessel saved being \$180,000.
3. Evidence of other captains, as to what they had paid for having their vessels pulled off in cases alleged by them to be similar, is irrelevant and incompetent.

IN ADMIRALTY.

Sharp & Hughes, for libellant.

White & Garnett, for respondent.

HUGHES, J. On the first day of December, 1881, about 2 o'clock A. M., the large passenger and freight steamer *Excelsior*, on her way from Norfolk to Washington City, while aiming for Old Point wharf in a thick fog, and endeavoring to avoid the shipping then lying in Hampton Roads, and feeling her way cautiously, drifted with the strong tide, then coming in, and grounded on the eastern shoal of Hampton Bar, about 1000 yards from the south end of Old Point wharf. She grounded broad-side-on, heading to the east. She tried for some time to get off by putting her engines hard at work; but these efforts only served to plant her higher and more firmly upon the bar. She finally desisted, and lay solid aground on the edge of the bar, some twenty feet from the channel. She remained in that position about twenty-eight hours: that is to say, until about 6 A. M. on the 2d of December, when she was finally got off. She was a vessel of 1350 tons, 240 feet long, and 40 feet wide. She was a steamer of peculiar structure, having been designed as a ferry-boat for transporting trains of cars from landing to landing. Her bottom was exceptionally broad and flat; and she laid flat upon the bar in such a manner as to require an extraordinary propelling power to pull her off.

During her stranding, the weather was good, and there was no heavy wind or sea. The time being December, she was liable to the perils of both wind and sea, and to bilge,

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and to being strained and damaged even in good weather in the position in which she lay. Capt. Parrish, an aged pilot, and one of the commissioners to examine pilots, says, the bar is a hard sandy bar, but not a shifting or quicksand. It is about three miles long.

The bar near that point is sometimes bare at low tide, and drops off very steep towards the channel; sinking from a few feet to five fathoms depth.

It is a point at which vessels are liable to be stranded. Soon after the Excelsior got aground, the steamer Westover ran upon the bar, bows on; but got off, and then tried to pull the Excelsior off; but failed. Before the late war, an experienced seaman, now agent of the underwriters in Norfolk, Capt Crellin, got off two or three vessels that had stranded on the bar; and during the war, he got off steamers which proved to be much bilged and damaged. Capt. Parrish, who is rather exuberant in his statements, says he has been on the bar "often enough," and seen hundreds of ships on it.

Capt. French has assisted three vessels off that bar in late years. During the 1st of December the wind was from the westward, which diminishes the tide on the bar; but on the night of her stranding, before the tug Sampson took hold of the Excelsior, it had been S. S. E. At about twelve on the night of the 1st the wind changed to the eastward, which increases the tide there. The tide on the morning of the 2d was fuller than it had been the day before at corresponding stages. The tide in these waters varies ordinarily only about three feet, and does so at this point, when not reached by southwesterly winds. Capt. Parrish has seen the bar bare just where the Excelsior lay. There seems to be a considerable difference between the time of the tide in the channel and on top of the bar, say somewhere from an hour to an hour and a half; but Capt. Parrish says there is no difference of this sort near the edge of the bar, (though he seems to contradict this statement in answer to subsequent questions in his cross-examination.) Capt. Crellin says, in certain winds the place is a bad one for

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vessels going ashore on the Roads side of the bar; and that a heavy vessel going ashore there on a rising tide, without using an anchor to hold her off, would be driven up on the bar by the tide coming flood; and that if the current was strong enough to cut out the sand from under its bottom, a heavy vessel would work down and become more or less imbedded in the sand; though a flat bottom vessel would not work down so much as one with a sharp bottom. It is strong currents that make a bottom of sand quick or shifting. In the absence of currents, a sandy bottom, like that under the Excelsior, may be very firm.

It has been already said, that soon after the Excelsior stranded, the steamer Westover went head on upon the same bar, near by, but backed off; and then having pulled at the Excelsior without success, gave up the undertaking. The Excelsior was next taken hold of by the steam tug Sampson, of Baltimore, a new boat, stated to be the most powerful tug belonging to Baltimore. The Sampson came to the Excelsior about day-break, or a little before 6 o'clock A. M. on the 1st. She got hold of the steamer's hawser without delay, and went to pulling on her. The hawser was an 8-inch one, and "was a pretty good rope" in the opinion of Capt. Starke of the Sampson. He pulled and swayed on the hawser for some hours. At 6 o'clock, when he began, the tide was at high water. He broke the hawser twice. After pulling one hour and a half, the steamer, which had given aid with her own engines, blew the water out of one of her boilers in order to lighten herself, but kept steam in the other and kept it at work, until within a few minutes before they told the tug to stop.

Capt. Starke says it was the power of the tug that broke the rope. The rope had been bought new in the preceding July. Capt. Starke says, that, in his judgment, it was impossible for any tug to have pulled the steamer off the bar as she lay when he got to her and when he left her; and that he told her master, Capt. Beacham, so; and that she was too high out of the water to admit of it; and was hard aground forward and aft.

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The like testimony is given by several witnesses of experience in such cases. Capt. Starke of the tug Sampson says, that he returned to the steamer on the morning of the 2d, before daybreak, and that the tide then was worse than it had been on the previous morning. The testimony is, that tugs, in pulling at a vessel in the condition in which the *Excelsior* was, if she is large and hard aground, are without sufficient purchase to draw it off, having none other than the resistance of water upon the propeller. Where an extraordinary power has to be applied to the stranded vessel, tugs are incapable of exerting it; and the usual course is, to obtain the requisite power, by planting one or more anchors out in the water, and attaching between them and the grounded vessel the usual mechanical apparatus for heaving her afloat.

The tide having considerably subsided by the time the *Sampson* ceased to pull at the *Excelsior*, on the morning of the 1st, nothing could be done until the ensuing afternoon, and the approach of another high tide.

On the morning of the 1st December, the agent of the *Excelsior* in Norfolk, Mr. Keeling, had an interview in that city with the libellant, W. H. French, a professional wrecker, on the subject of getting the steamer off. Capt. French was the owner of the wrecking schooner *Joseph Allen*; and was a mariner and a professional diver and wrecker of several years' experience; and was known to Mr. Keeling as such. After telegrams had passed between Mr. Keeling and the agent of the *Excelsior* at Old Point, and her master, Capt. Beacham, a telegram came from Old Point directing Capt. French to come with schooner, anchor, cables, and a good strong tug boat, at once, before 8 o'clock P. M.

Capt. French accordingly made preparations to proceed, with no stipulation as to the compensation he should receive; but giving his own assurance that the charges should be "reasonable." At no time before the service, whether in conversation with Mr. Keeling in Norfolk, or Capt. Beacham on board the *Excelsior*, did Captain French men-

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tion any specific sum as his charge, but said invariably it should be reasonable; and refused to mention any sum. He did say on one occasion on the steamer, to Captain Beacham, that he would consult Capt. Joseph Baker, (who is the oldest wrecker in Norfolk,) as to what it should be. After the ship was got off and all the parties were in Norfolk, Capt. French presented a bill for \$800 for his services. Capt. French undertook the job at the instance of Mr. Keeling, some time after 11 A. M., on the 1st December; and at once made ready the schooner, Joseph Allen; which he provided with tackle, wrecking apparatus, two anchors, one a very heavy anchor of 3,500 lbs: a strong 12 inch hawser, a chain cable and a hoisting engine, the largest used by the Baker Wrecking Company; and set out for Hampton Bar in tow of the steam-tug Olive Baker, Capt. Chase, master, stated to be the strongest and best pulling tug in the harbor of Norfolk. Capt. French took along with him his mate, C. H. Godfrey, a professional wrecker; Charles Izon, a professional diver and wrecker; and four or five other men; besides the crew of the Olive Baker. He arrived at the Excelsior with these vessels, wreckers and wrecking appliances about 3 P. M., having left Berkley about 1 P. M. On being asked by Capt. Beacham, Capt. French at once replied that he thought it would be impossible to pull the vessel off without laying anchor and cable. The anchor was laid S. E. of the steamer by the aid of the tug, and the cable from it was passed through the side chock of the ship, to the schooner on the starboard quarter of the Excelsior. The cable was made taut in time for the tide. There was some delay in getting up steam in the hoisting engine, from having to fill the boiler with water; and there was some interruption of work afterwards from leakage in the boiler. Capt. French says, that they got up steam in the hoisting engine about half past four and that they first hauled on the cable to make it taut about that time.

He says, "between 5 and 6 P. M. of December the 1st we were laying with steam on the hoister, cable taut, waiting for the tide to rise, so as to heave on the cable; and about

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6 o'clock we judged it to be high water, or a little after. At that time we were pulling as hard as we could on our cable, and about half past six, the captain of the Excelsior thought if the tug would take hold and help, we might start her. I didn't think there was any use. We called her alongside. We gave Capt. Chase a line and he took hold about 7 o'clock and we were heaving on the cable all the time. He pulled steadily at first; but the captain thought by backing up and *snatching her*, he might move her. He tried that several times and in the last pull parted the hawser; and did not start her." Captain Chase made no further effort that night after parting the hawser.

Mate Godfrey of the Joseph Allen, says: "We began heaving on the cable and pulling on the tug at high water and did not succeed in moving her with cable and tug." He says the six foot mark of the Excelsior was out of water at the time, about 6 o'clock, that is to say at high tide. The witnesses of the steamer say that one end of the Excelsior was pulled around on the occasion about 11 feet on the evening of the first. I think this statement is improbable. There was thus a failure on this evening to get the ship off by heaving upon the anchor and cable, pulling by the Olive Baker, and, from Capt. Beacham's testimony, heaving on a 1250 pound anchor which the ship had out. So the effort was given over for the night after the tide had begun to subside.

I do not think it worth while here to enter into any consideration of the difference of time between the tides on the bar and in the channel. I am sure that, when the witnesses spoke of the tide in connection with their efforts to get this vessel off, they meant to speak of them as they were at the particular place where the Excelsior lay, and where they were making their exertions to get her off. I cannot believe that they meant to speak of the tides anywhere else; and I feel it to be useless in this examination to consider the variation of the tides in different places. I cannot believe that the tide in the channel would be at high water many moments earlier or later, than on the edge of the bar shelving steeply and abruptly down into the channel.

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Capt. French with his schooner Joseph Allen lay by the Excelsior all night; and ordered the Olive Baker which went off to an inner anchorage, to return before daybreak the next morning.

The Allen changed her position from the starboard quarter to the port quarter of the Excelsior, and grounded in the night; her draught was four feet and a half.

Mate Godfrey says, "on the next morning at 8 o'clock, we commenced pulling on the cable after getting up steam, we commenced first to pull on a triple purchase, and when we found that we could not move her, we put an extra tackle and commenced pulling on that. As soon as we commenced pulling on that, she commenced coming off about quarter past five that morning. We pulled her 20 feet as near as I can guess at by cable, which I looked at when it was pulled in." The Olive Baker had come at five o'clock that morning. Between 5 and 6 the Excelsior gave her a hawser by Capt. French's orders. She went ahead and pulled the Excelsior's head around."

Charles Izon, the wrecker, confirms the foregoing; and on being asked whether, "during the time the Excelsior was moving that twenty feet under the strain on the cable and anchor, the ship's engines and the tug were co-operating to get her off, or whether it was solely by heaving on the cable," answered: "Altogether by the cable; the tug was not pulling on her, nor were the engines of the Excelsior moving," at the time she was so moving.

Capt. French says: "I called Charles Izon to get steam about 2 or 2½ in the morning. I turned out shortly afterwards, called all hands, went aboard the Excelsior, and got ready to go to work; pulled on our fall that led to the cable, led our main purchase on the hoister, pulled all we could pull well, and then put on a buff tackle and pulled awhile; then stopped to wait for the tide; did not move her before we stopped. In a few minutes we worked on the hoister again, and found she was coming; this was about half-past 5 A. M. We pulled her off about twenty feet, got about twenty feet on our cable, and found she was coming a little

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too easy for a buff tackle. We took that off, and led the main purchase aboard of the schooner again, then called the Olive Baker to take a line to the Excelsior, and told the captain of the Excelsior to work the port wheel, that was on the inshore side. We went ahead on our hoister as fast as we could, and the Excelsior went right off. She was afloat about 6 o'clock, I judge. Olive Baker took hold of her, and just about had time to tighten her line when she went right off. The hour of high water that morning, as near as I can judge, was from half-past 6 to 7, with that easterly wind. If we had had no anchor or cable there, the effect of a strong northeasterly wind and swelling sea that day upon a steamer stranded broadside on the outer ledge of the bar would have been, not to take the vessel off, but to put her higher up."

Capt. Beacham says: "At 3 A. M. next morning the second officer awoke me and said the tugboat Sampson was there and wanted to know if I wanted him to pull at me at high water. I said 'no,' we would easily get off with the tug we had. I got up at half-past 4, and went down on the main deck. The first man I saw was French. I asked him to take coffee. He said he had had coffee. I asked him if he had steam; he said 'yes.' I told him he had better pull on her a little, which he did to get the slack of his hawser up. I then measured the water on our starboard side (which was the channel side), and found 8 feet 6 inches of water. Then the tugboat Baker came, gave us his line by request of one of my mates, I think, put it in our chock on the starboard side. He gave us the line on his own accord, and I then told my engineers to work my engines one ahead and one back to shake her. I wanted to see if she was afloat. I found she was afloat. French was then standing on our starboard side with an oar overboard. After the tug got steam on us I told my engineers to go ahead on both engines. The hoisting engine was not at work at this time. When the Excelsior's engines went ahead, she shot right ahead, and the tugboat pulled our bow around and went ahead so fast that the Joseph Allen broke

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away from us. We came off the bar and swung around to the hawser of the Allen, and we then came to Norfolk under our own steam."

I do not know that this evidence of Capt. Beacham necessarily conflicts with that of Capt. French, Izon and Godfrey. They would seem to have got the vessel to moving, and to have brought her to the extreme edge of the channel, in 8 feet 6 inches of water, unconsciously to Capt. Beacham. She seemed to have moved so insensibly that Capt. French could not verify the fact except by putting an oar overboard to mark the movement. It was after the Excelsior had been thus brought to deeper water that Capt. Beacham ordered both his engines to work, and that the ship "shot off."

Capt. Beacham makes statements in his evidence, doubtless in perfect good faith, which I find it hard to credit. He says that the hawser of his ship, upon which he depended for the Sampson to pull him off on the first morning, and which he allowed the Olive Baker to use the first evening and second morning, was "very rotten anyhow." He says that he would have been lying with his fine ship on Hampton Bar till now before he would have consented to pay \$800 to Capt. French to get her off. He says that the Excelsior could have lain where she was a year without receiving any injury; and this whatever might be the changes of weather or sea. After sending for a wrecking schooner, with anchor, cable, and other things, and bringing professional wreckers and their appliances to his vessel's side and aid, he represents that he did not wish to use them; speaks of Capt. French's movements in planting his anchor and rigging his hoisting engine and cable as "fooling around" his ship; and implies finally, if not stating in terms, that the assistance rendered by the wreckers on the morning of the 2d, was of no avail or efficiency, and that his vessel went off the bar easily when the tide came, for which he had been waiting; went off by force of her own engines.

I can't help feeling that such statements, made in excess

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of zeal, and no doubt made in good faith, impair the value of Capt. Beacham's testimony. Though he testifies, if not expressly, at least by implication, that Capt. French did nothing on the second morning for the ship, yet Mr. Plant, one of his ship's stockholders, who was on board, and who was up and awake all night, says that he timed by his watch, and that Capt. French was at work an hour and fifty minutes before the vessel moved. If she moved at half-past 5, then Capt. French had been at work since forty minutes after 3 A. M. If Engineer McDonnell testifies rightly, when he says that his order to his fireman was to have steam at 5 that morning, his engines could have had very little to do with getting the ship in motion; and this inference is the stronger from the fact that Capt. Beacham seemed unconscious of what Capt. French was doing.

My conclusion founded on a heavy preponderance of testimony in this case is, that the Excelsior was stranded beyond the power of her own engines and anchor and cable to pull her off; that the use of her own engines in such an effort could only aggravate her predicament; that she was planted on the edge of that bar so firmly that it was beyond the capacity of the most powerful tug to get her off; that the use of the heaviest anchor and most powerful hoisting engine, cables and tackle accessible in Norfolk was necessary to her relief; that application was made to a professional wrecker at Norfolk for wrecking appliances; and that they were furnished by the libellant, and the wrecking service was rendered, successfully rendered by him, without previous stipulation fixing the amount of compensation for the service.

Evidence was taken by the respondent, before the commissioner in this case, of Capt. Howes, master of the ocean steamer W. H. Crane, designed to show what Capt. Howes had paid for tug service and other assistance he employed when his ship was on one occasion aground in the upper part of Chesapeake Bay. Evidence was also taken by the respondent, of Mr. Plant, as to what he had paid for getting some other vessel off that was once grounded near

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the mouth of the Potomac river. It would have been competent to ask either of these witnesses as experienced steamboat men, what price per day or hour was usually paid to powerful tugs employed in getting off large vessels stranded on bars, and what was the usual cost of labor, and what the hire of wrecking apparatus in such work; but evidence (taken without previous notice to the opposite party) of some of the particulars of such a service, and of but one witness as to that service, there being no pretense that the whole truth or facts are given, especially where most of the service seems to have been performed by contract, is not competent testimony in any case under judicial examination; and I do not feel at liberty to consider the testimony given by Capt. Howes, or that given by Mr. Plant respecting the vessel or vessels which they respectively alluded to as stranded in the waters of the Chesapeake.

In the sketch of the evidence which I have thus given, I have had reference almost exclusively to the question whether this was or not a case of salvage.

It is useless for me after the elaborate manner in which the question of salvage was treated in the recent cases of the *Sandringham* and the *Dana*, to discuss here at length the law of salvage. That this was a case of salvage is clear. The ship was hard aground broadside on, upon a ledge of sand, where every exertion of her own engines would only tend to plant her more firmly upon the bar. She repeatedly tried these, with the assistance of a cable heaved upon her own large anchor of 1250 pounds, and of the propeller Sampson and Olive Baker successively, the most powerful steam tugs in these waters; but tried in vain. Even the use of the large anchor and cable of Capt. French, aided by her own heavy anchor and cable, and her own engines, and by the Olive Baker, was unavailing to the *Excelsior* on the evening of the 1st December. I cannot entertain a doubt that it was by the agency of the libellants' anchor and cable on the morning of the 2d December that she was finally drawn off. That she could not have got off with her own engines on that morning, against a higher tide

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than that which carried her on the bar on the morning of the 1st, reinforced by a strong easterly wind, but would have been driven farther on the bar, seems to me to be almost as certain as a mathematical truth.

It is clear therefore that the vessel was beyond the reach of self help and self rescue. She was also in a situation beyond the capacity of the most powerful steam tugs to rescue her. Two of these and the steamer Westover had tried in vain to pull her off. She was therefore a *subject for salvage*. She employed wreckers to perform a *salvage service*. She was actually rescued by the wreckers; and the service performed in rescuing her was a salvage service. Being a salvage service, this is a case for a greater reward than that of mere compensation for work and labor done. The libellant is entitled not only to such compensation, but also to a reasonable reward as bounty for his enterprise, and for the use of expensive wrecking apparatus always liable to loss, wear and tear, and deterioration.

As to the compensation, the respondent concedes that this may be \$300, by the deposit of that amount in court. I think that on this score a fair allowance would be \$350.

As to *reward* or *bounty*, the case is not one to justify a large amount. A vessel ashore on Hampton Bar, is probably less at risk than on any other ground on the Atlantic seaboard. And wreckers, wrecking vessels and wrecking apparatus are probably as little at risk in hauling ships off that bar, as from any other shallow place in this part of the world.

There is no element in this salvage service which calls for more than a moderate award, except the extraordinary value of the vessel saved, (her value being proved to be \$180,000), and the success of the libellant in getting her off speedily and unharmed. I think therefore, that, in such a case as this, the idea of percentage must be discarded, and that a lump sum should be given as bounty, having no direct reference to the extraordinary value of the Excelsior. This may be the same as the compensation which has been named. I will give a decree for \$700 and costs. This

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amount is within the sum advised by Capt. Joseph Baker before the libellant rendered his bill for \$800 expressing his own estimate of the value of his services, and but little within that estimate. I don't think I would be justified in this case in giving a higher award than the libellant's own original demand.

*United States District Court, Eastern District of Virginia,
at Norfolk, October 21, 1882.*

W. R. POLK v. THE STEAMER J. W. FRENCH.

- *1. A court in determining the title to property may examine collaterally into proceedings in another court which profess to change the title to such property.
2. The doctrine that the first court which obtains custody of property holds it to the exclusion of all others, applies only where its jurisdiction to hold the property is lawful. A mere seizure unauthorized by law is a trespass and does not exclude another court of rightful jurisdiction from taking custody of the property.
3. A proceeding which purports to divest one man of his property for the alleged act of another, without giving the owner a day in court and a jury trial to defend his property, is void as not being due process of law, whether such proceeding was the act of a court or based on a statute.
4. A statute which provides that any person violating it shall forfeit "his vessel, boat or craft," means only to forfeit the property if owned by the offender, and does not mean to forfeit the property of one not the offender, even though used by the offender.
5. A verdict of a jury which merely finds the prisoner guilty and does not mention the vessel, is not a finding that the vessel was used in the commission of the offense, even though the vessel was named in the indictment.
6. The fishing laws of Virginia (Code ch. 100, and Acts 81—2, p. 235) examined and construed.

IN ADMIRALTY.

Sharp & Hughes, for libellants.

A. S. Segar, Harmanson & Heath, for respondents.

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HUGHES, J. This is a petitory suit in admiralty brought to try the title to a vessel (the steamer J. W. French) and to recover possession of it from one who is alleged to have been a tortious holder. This steamer, when process issued from this court, is alleged to have been in the possession of the sheriff of Elizabeth City county, Virginia, under an order for its sale by a judgment of the county court of that county. The libellant has never been a party to any proceeding of that court in which such an order of sale was made. The proceeding there was not one *in rem* which binds all the world, and in which the libellant could have become a party by appearance, and by answer or petition. The proceeding there was a criminal prosecution in which the crew of the steamer J. W. French, were all arrested, and in which her master, W. E. Overton, was indicted and tried, the rest of the crew having been discharged. The law of Virginia allows a steamer to be arrested and, under the limitations hereafter stated, held by the court while such a prosecution of any person belonging to her is pending; and this vessel was under arrest pending this prosecution, which terminated with a verdict of guilty and a fine of one cent and costs against Overton, and his release from custody. The judgment against Overton in this verdict went on summarily to order a sale of the steamer by the sheriff, although the indictment had not charged that the steamer was the vessel of Overton; —“his vessel.”

There was no provision of law by virtue of which the libellant W. R. Polk, could have appeared and become a party to this prosecution of Overton; although the record in the prosecution, pending which the steamer J. W. French was held, shows that W. R. Polk was the owner, and that this fact was in the cognizance of the court, and that the court failed to give Polk, the owner, a day to show cause against the sale of his property.

It may be conceded in respect to ships and maritime property, that the owner may be bound by a proceeding *in rem*, though he do not appear; and in some cases even

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though in his physical person it was impracticable for him to appear. See *United States v. The Malek Adhel*, 2 How., 210; which was a proceeding in admiralty on a libel *in rem*. This results from the peculiar character and circumstances of maritime property and persons—a proceeding *in rem* being one in which a *thing*, *i. e.*, the property seized is itself sued instead of a sentient person; and in which, the property itself being sued, its owner is not recognized until he comes in, claims and defends.

It is also well settled, generally, that every person is bound by the order of a court of competent jurisdiction in a proceeding to which he is a party, although only constructively so.

But the case at bar belongs to neither of these classes. The property of this libellant was condemned to sale in a proceeding to which he was not a party, and which was not a proceeding *in rem*; nor a proceeding against the vessel itself, in any form.

The suit here is brought to test the title to a steamboat; and one of the questions in the case is, whether this court can examine into the validity of the proceedings of a court which undertook to divest the libellant of his vessel without a hearing, and to vest it in a purchaser.

There is another question in this case. The libellant denies that the court which undertook to divest him of his ship had jurisdiction to make the order directing the sale by which that result might be effected; and he contends that that court was without such jurisdiction not only because he, the owner, was not before it, and could not get before it; but because that court had no authority under the laws of Virginia, under which alone it could act, to make such an order of sale as it did make, even though he had been a party to the proceeding.

No principle is more thoroughly settled than that any court may examine collaterally into the jurisdiction of another court to pass on questions of title to property, and if the other court has done an act *coram non judice*, to disregard it altogether. When a court possesses jurisdiction as

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to subject matter and parties, it has a right to decide every question which arises in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is binding upon the parties. "But if it act without authority its judgments are considered as nullities, and form no bar to a recovery which may be sought, even prior to a reversal in opposition to them." Judge Livingstone in *Fisher v. Harnden*, 1 Payne, C. C., 58. "The power of a court is of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into, and its authority to decide questions which it professes to decide must be considered." Ch. Justice Marshall in *Rose v. Himeley*, 4 Cranch, 268. "When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until rescinded, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and prove no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject, and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court where the proceedings in the former are relied on and brought before the latter by a party claiming the benefit of such proceedings." Mr. Justice Trimble in *Elliot v. Peirsol*, 1 Peters, 840. In *Windsor v. McVeigh*, 8 Otto, 274, it was held that a sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. See also *Underwood v. McVeigh*, 28 Grattan, 407, where a decree for the sale of property in a proceeding in which the owner had no day or hearing was held a nullity.

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In the case of *Greene v. Briggs et al.*, 1 Curtis C. Ct., 811, under a law of Rhode Island authorizing the seizure, condemnation and destruction of spirituous liquors, certain liquors had been seized on a magistrate's warrant and afterwards condemned and ordered to be destroyed by a court of magistrates of the city of Providence; but previous to the destruction, an action of replevin had been brought in the United States circuit court, and the goods had been seized in replevin by the U. S. marshal.

The defendants filed an avowry setting out all the facts in answer to the action, and there was a demurrer to this plea. Mr. Justice Curtis, in giving judgment for the plaintiff, not only went into a full examination of the validity of the proceedings of the magistrates' court, and its jurisdiction to pass the orders which were entered in the case, but treated them as nullities, holding in regard to the warrant of seizure that "an order by a justice of the peace, concerning a matter not within his jurisdiction, is void; and he, and all ministerial officers who execute that order, are trespassers." He cited *Wise v. Withers*, 8 Cranch, 331; Cowper, 140; 7 B. & C., 536; 5 M. & S., 314; 11 Conn., 95; and 8 Wend., 200. He went on to say: "Such an order confers no authority to detain property, and is not a defense to an action of replevin."

The proceedings before the magistrates' court were based upon a law of Rhode Island directing spirituous liquors to be seized, condemned and destroyed, allowing the owner to appear, but not allowing him the benefit of a trial by jury, except upon paying an onerous tax; and it was principally on that ground that the orders of the magistrates' court (answering to our county court), were treated as nullities by the judge of the United States court. That case is very similar in its leading features to the one at bar; except that Greene, the owner of the property seized, appeared and filed a claim to it before the magistrates' court, and was a party to the proceeding there.

The case of *Wise v. Withers*, cited by the judge, decided that a court of law may look into the jurisdiction of a court

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martial as to an order it had made affecting the rights and property of a citizen.

I think it perfectly clear, therefore, that this court in determining who owns and who has the right to the custody of this steamer, the *J. W. French*, may look into the legality of the proceedings in the county court of Elizabeth City county, under which the sheriff held custody of the steamer when she was taken by the United States marshal.

There are many cases in which it is held that when one court of general jurisdiction obtains jurisdiction of a controversy and custody of property which is the subject of that controversy, no other can take jurisdiction of either, especially of the property. This general principle is well settled. *Taylor v. Carryl*, 20 How., 583, is a leading case on this point. The same was held in *Orton v. Smith*, 18 How., 263; *Hagan v. Lucas*, 10 Peters, 400; the ship *Robert Fulton*, 1 Payne C. C., 620; *The Oliver Jordan*, 2 Curtis C. C., 414; *Freeman v. Howe*, 24 How., 450; *Buck v. Colbath*, 3 Wall., 334; and *Underwood v. McVeigh*, 3 Otto, 274; but it will be found in all these cases the custody of the officer first in possession of the property in controversy was conceded to be lawful. These cases are distinguished by that important fact from the case at bar, in which it is alleged that the sheriff's custody was unlawful, and therefore tortious. But even in cases where the first custody is lawful, it was held by Mr. Justice Miller, in *Buck v. Colbath*, speaking for the supreme court of the United States, that "the rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in it, is subject to some limitation, and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility be involved in it."

And Mr. Justice Field, speaking for the supreme court of the United States, held, in *Windsor v. McVeigh*, that "the

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doctrine, that when a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause; and its judgment, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds after gaining jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In this case the court said: "All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil and criminal; or to particular modes of administering relief, such as legal or equitable, etc. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant; if the action be for a libel or personal tort, the court cannot order the specific performance of a contract; if the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority."

In the case at bar the court, in a criminal prosecution against one man, proceeded to decree the sale of the property of another man. The owner had no hearing at all; and of course had not the privilege of trying before a jury on a defense made by himself, the issue of fact on which the condemnation of his property to forfeiture depended. The thirteenth clause of the Bill of Rights of Virginia provides that in all controversies concerning property, the right of trial by jury shall be sacred, whether they be between man and man, or between the state and a citizen. Code of 1873, page 69. This guaranty of a jury is to the

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owner of the property himself; and it were a mockery to say that it was fulfilled by some one, other than the owner, having had the benefit of it. If the commonwealth obtains a verdict against Jones for a capital offense, she cannot hang Smith. Smith has a right to be heard for himself, and to be tried by a jury sworn on the issue between the commonwealth and himself. As Smith's life and liberty cannot be affected by a verdict against another, so his right of property cannot be.

In *Greene v. Briggs*, before cited, it was held that a citizen of Rhode Island could not, under the constitution of Rhode Island, be deprived of his property without verdict of a jury, and unrestricted opportunity of making defense even in a proceeding *in rem*, (not in admiralty). The privilege of appearing and making defense, with trial by jury, was subjected there to a tax.

In *Woodruff v. Taylor*, 20 Vermont, 65, quoted approvingly by the United States supreme court in *Windsor v. McVeigh*, the supreme court of Vermont said: "A proceeding professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The mere seizure of property either on a criminal charge or in a civil action, does not give jurisdiction to condemn it to forfeiture. "The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner, and parties interested, to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. * * * The manner of the notification is immaterial; but the notification itself is indispensable." *Windsor v. McVeigh*, 3 Otto, at page 279. The right of opportunity to appear and be heard is too sacred

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to be denied even to one occupying the status of an alien enemy. In *McVeigh v. United States*, 11 Wallace, at page 267, Mr. Justice Swayne said for the U. S. supreme court: "The order (to strike from the record the owner's appearance, claim and answer) in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

In *Bradstreet v. Neptune Ins. Co.*, 8 Sumner, 601, Mr. Justice Story said: "It is a rule, founded on the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear;" and he characterized condemnations without these conditions "as mockeries and in no just sense judicial proceedings," "to be deemed, both *ex directo in rem* and collaterally, as mere arbitrary edicts, or substantial frauds."

It follows, therefore, that, in order to the validity of its proceedings, the county court of Elizabeth City county must not only have had jurisdiction of the subject on which it adjudicated, but it must have proceeded according to the mode usual in the condemnation of property and authorized by law; and it follows further that this court may in the present collateral proceeding examine into the jurisdiction of that court and the regularity of its proceedings in ordering the sale of the steamer French by the sheriff of the county.

I proceed, therefore, to that examination. The prosecution in the county court in question was commenced against all the crew of the steamer French, but continued only against her master, W. E. Overton. The indictment charged that Overton, captain and commander of a certain vessel

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propelled by steam and known by the name of the J. W. French, on the 8th day of July, 1882, in the county of Elizabeth City, did take and catch a certain quantity of fish by and with the said steamer J. W. French, against the form of the statute, etc., and the peace and dignity of the commonwealth. Other counts in the indictment charged, in the same form, that he caught "floating fish," and that he caught "floating fish known as alewives for the purpose of manufacturing said fish into oil and manure." The indictment nowhere charges that the steamer was the property of Overton, or, in the language of the statute under which he was indicted, was "his vessel."

There was no proceeding against the vessel itself, either *in rem* or any other form, there was no charge in the indictment against the vessel herself; she was named only in the incidental manner above shown. On the trial the jury found a verdict in these words: "We, the jury, find the defendant, Willis E. Overton, guilty, and assess his fine at the sum of one cent." On this verdict the court entered judgment as follows: "And thereupon it is considered by the court that the commonwealth recover against the said Willis E. Overton the sum of one cent, the fine by the jurors in their verdict assessed, and the costs of the prosecution. And it is further considered by the court that the steamer J. W. French, described in the indictment, and on which the said defendant was captain, and which the jury have found was used in taking fish, as charged in said indictment, in the Chesapeake bay, contrary to law, together with her necessary apparel, the two seines and two small boats belonging to her, (nothing about apparel, seines, or two small boats appear in the indictment), be condemned and forfeited to the commonwealth of Virginia. And it is further ordered that the sheriff of this county, after giving at least twenty days notice, posted at the court-house door of this county, and at other public places in said county, sell on the first day of the August term of this court, between the hours, etc., of that day, at public auction, for cash to the highest bidder, the said steamer J. W. French

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and her necessary apparel, and the said two seines and small boats. And it is further ordered that the said sheriff do make report of said sale to this court, and that the clerk of this court do make return thereof to the auditor of public accounts. And the said sheriff shall account for and pay the proceeds of said sale to the auditor of public accounts, in the manner prescribed by law, etc.”

It is plain from the terms of this judgment that it was intended to be a final condemnation of this steamer, her apparel, seines, and attendant boats; that it was an order for their sale, and a disposal of the proceeds of sale, in exclusion of all claims on the part of Polk, the owner, upon the property or the proceeds of sale. There is no pretense of a proceeding *in rem* against the steamer. There is no shadow of any proceeding specifically against the steamer or against the owner. She is mentioned only incidentally in the indictment against Overton, and upon a verdict of guilty procured against him alone, of an offense so slight as to be condoned by a fine of one cent, the judgment of the court against Overton, after averring contrary to the fact that the jury had found that the steamer had been “used in taking fish,” goes on to condemn it as forfeit, and to order its sale for the benefit of the treasury of Virginia.

This was a proceeding at common law; and while it is true that in actions *in rem* in admiralty, property in the nature of ships may be divested from an owner without the verdict of a jury, yet I think it can be laid down with perfect truth, that in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. Condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury. See *Union Ins. Co. v. United States*, 6 Wall., 765; *Armstrong's Foundry*, 6 Wall., 769; *Morris's Cotton*, 8 Wall., 507. Proceedings *in rem* were unknown

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to the common law. 2 Brown's Civil and Adm. Law, 111; *Percival v. Hickey*, 18 Johnson, 257, 292; 1 Kent Com., 378. Common law courts have jurisdiction of them only by virtue of statutory enactment. If congress gives this proceeding in common law courts, without requiring trial by jury, it violates article seven of the Amendments to the National Constitution. If the legislature of Virginia gives this proceeding to its courts, or the right of condemning property without giving to its owner the right of trial by jury, it violates section 13 of the Bill of Rights. Such, also, was the emphatic, I might almost say indignant, ruling of Mr. Justice Curtis, one of the ablest of American judges, in *Greene v. Briggs*, already cited; and may be regarded as a fundamental canon of English and American jurisprudence.

It were a mockery to say that the brief verdict just recited given against Overton, comprehended the steamer of Polk at all, even if it had been charged in the indictment to have been Overton's property; or could work a forfeiture of the property of Polk, the libellant here, in the eye of the great canon of English and American law which has been referred to.

When we examine the laws of Virginia under which, alone, the proceedings against this steamer could have been had, we shall find that the order of sale which has been recited was even in respect to them without authority.

The fifth section of the one hundredth chapter of the Code of Virginia, as amended by the act of March 6, 1882, (see Acts, page 235,) after prohibiting the catching of alewives fish, except in certain waters, contains two clauses, in these words: "No boats propelled in whole or in part by steam shall be used for the purpose of towing or conveying boats that are used for the purpose of taking fish." "Any person violating the provisions of this act shall, upon conviction, be deemed guilty of a misdemeanor, and shall forfeit his vessel, boat or craft, and all purse-nets or seines used in taking or catching fish, and shall be fined not exceeding \$1000—one-fourth of which shall go to the informer."

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The forty-sixth section of the same chapter of the Code, provides that under the warrant for the apprehension of any person for the violation of this chapter, "the officer executing such warrant shall take possession of any vessel, boat or skiff (with their tackle and appurtenances), which the defendant may belong to or be using, or have used, in the commission of the offense for which he is prosecuted, and hold the same until the recognizance required be given, or until the defendant be acquitted. But if judgment be given against the defendant it shall be part of the judgment of the court, that, if the penalty and costs be not forthwith paid, all the property so seized shall be sold, and the proceeds accounted for as if it were the property of the defendant, seized under an execution for the satisfaction of the judgment."

Learned and industrious counsel have shown nothing in the code or statutes of Virginia, other than the foregoing sections under which the county court of Elizabeth City county could have acted in its condemnation of the steamer J. W. French. There is a section of another chapter (sec. 29, of chap. 109) which points out what court, and how it shall dispose of property already legally forfeited; but there is no law prescribing the manner of dealing with vessels, boats, and like property, which have been used by offenders against law, except the sections which have been quoted.

I am to examine, therefore, whether the county court of Elizabeth City county, complied with the law in its condemnation of the steamer of this libellant. The law forbids the catching of fish in certain parts of Chesapeake bay, and forbids the use of steamers anywhere for towing or conveying boats employed in catching fish: declaring that "any person" violating this act shall "forfeit his vessel, boat or craft, and all purse-nets and seines used." This language imposes the inquiry whether it was the intention of the legislature to exact a forfeiture of any property other than that of the offender himself. The language of other acts, probably of all other acts of Virginia but this, in declaring the forfeiture of property employed in the com-

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mission of offenses, declare also in clear and unequivocal terms that the property employed in committing the offenses shall be forfeited. For instance, the oyster act of March 6, 1882, passed contemporaneously with the one under consideration, after prohibiting the act of the offender, goes on to say that "the canoe, vessel or boat so employed in catching, etc., shall be forfeited and sold." If it had been the intention of the legislature to forfeit the vessel used in catching alewife fish irrespectively of ownership, it would have employed language clearly and explicitly conveying that meaning, and would not have seemed to confine the forfeiture to vessels and property owned by the offender himself;—to "his vessel, boat or craft."

The language of the statute affecting the present case is, that "*any* person" belonging to a steamer, who engages in taking fish in violation of its provisions, shall forfeit "his vessel." If in this phrase the law could be held to mean the vessel to which any offender might belong, then a mere cook on a steamer, who temporarily left his kitchen cabin and went out to engage with strangers in catching fish unlawfully, would thereby work a forfeiture of the steamer on which he was employed. To contend for such a construction of the phrase "his vessel," is to demonstrate its inadmissibility. The law speaks of boats, purse-nets and seines; and contemplates that these latter may belong to fishermen; while steamers may belong to owners who are not fishermen, and seems to provide, in using the phrase "his vessel, boat or craft, purse-nets and seines," that each offender against its provisions shall forfeit whatever property employed in the offense may belong to himself personally.

This would seem to be a just and reasonable construction of the meaning of the term, "his vessel," employed in this act, irrespectively of those canons of construction which all enlightened courts of justice apply to statutes imposing penalties and forfeitures. These latter, however, leave no room for doubt as to the construction proper to be placed on the statute under consideration.

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Forfeitures are odious in the eye of the law, and it is a cardinal principle that statutes of forfeiture shall be construed with the utmost strictness. The forfeiture here is imposed in the penal clause of a penal statute; and Mr. Bishop, (1 Crim. Law, sec. 250,) using the early English of the old common law jurists, lays it down, in respect to penal laws, that "no case is to be brought by construction within a statute while it falls not within all its words. If a case is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute."

If, therefore, a statute says that W. E. Overton, on conviction of having committed an offense against its provisions, shall be punished by fine and imprisonment, and shall forfeit "his vessel" employed in the commission of the offense, the statute cannot be enlarged by construction to mean that he shall forfeit the vessel of another person; it can be construed to mean that he shall forfeit only the vessel owned by himself; it cannot be construed to mean *any* vessel which he employed in committing the offense.

Forfeitures being odious to the law; if the legislature intends that one man's property shall be forfeited for another man's offense, it should, and, I may add, always does, so declare in express, explicit and unmistakable language.

Neither Overton, nor any seaman, fireman, engineer or cook, on board the steamer French, could, by violating the fishing law of Virginia under consideration, do more than forfeit any boat, or craft, or net, or vessel, which he himself actually owned, and no verdict of a jury found against Overton under this law could work a forfeiture of another's property.

Independently of this consideration, there was no warrant of law for the particular judgment of condemnation and sale which was rendered against this steamer, the J. W. French. The forty-sixth section of the one hundredth chapter of the Code, simply provides for the detention of a vessel which has been employed in committing an offense,

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as a security for the payment of the fine and costs adjudged against the offender who used her. It directs the vessel to be held until the recognizance required of the defendant be given, or until he be acquitted; and, if judgment be given against the defendant, it requires it to be made "part of the judgment of the court, that, if the penalty and costs be not forthwith paid," the vessel shall be sold and the proceeds accounted for as under execution.

If this provision of law had been complied with, the steamer *J. W. French* would have been instantly released. The judgment against the vessel was void in having been couched in terms wholly unauthorized by the statute, both in respect to the vessel and to the disposal of the proceeds of its sale; it was, as to the owner of the vessel, void in not having employed the alternative words peremptorily directed to be inserted by the statute. No alternative was given to the owner of the vessel or her master to redeem her possession by the payment, even "forthwith," of the fine and costs adjudged against Overton; which, in point of fact, were paid forthwith. Not only was this requirement violated, but, without the warrant of any law known to the statutes of Virginia, this libellant's property was ordered to be sold for Overton's offense; itself pronounced by the jury to have been of the most trivial character.

The judgment of condemnation and sale, being without warrant of law, could confer no right upon the sheriff to the custody of the vessel. His possession was tortious, and he held her against the process of this court only as a trespasser. I will so decree.

In regard to the steamer *Grace*, heard at the same time with the case of the *French*, I do not think she can be held, under the law of March 6, 1882, liable to forfeiture for the act of one conceded not to have been her owner, and I will so decree in her case.

Statement of Facts.

*United States District Court, Eastern District of Virginia,
at Richmond, January 25th, 1883.*

J. L. SCHOOLCRAFT v. THE STEAMER CARRIE.

* A small steamer which had filled and become water-logged, near night, in the narrow channel of a very wide river, directly in the path of three large steamers due at that point in a few hours, and which had been left by her crew not anchored, and with no light, was towed out of the channel and fastened to a wharf by another steamer, the whole service occupying four hours.* The steamer thus saved was worth \$2400, and the cargo, worth about \$150, was picked up floating on the water, and also saved. One-fourth of the value of the vessel, and one-half of the value of the cargo saved, was allowed as salvage.

IN ADMIRALTY.

The steamer Carrie, quite heavily loaded, while on her way from some of the wharves on lower James river, bound for Petersburg, and when opposite Blair's wharf, on the afternoon of the 15th of December, 1882, began unaccountably to leak from the opening of her seams, and to sink rapidly. Master and crew were thoroughly surprised, and hardly had time to make their escape upon a row-boat. They reached a schooner in the river exhausted with fatigue, thoroughly drenched with water, and chilled by the exposure. The Carrie was left adrift in the channel of the river. No anchor was thrown out, no anchor light was put up. A large part of the cargo floated off upon the current. The disaster happened about 8 o'clock in the afternoon. The steam yacht Mary came into the vicinity of the Carrie, soon after; and upon signal from the schooner which has been mentioned, went alongside of her. Her owner and master found the Carrie's master in the cabin of the schooner shaking with an ague; and at his request took himself and crew to Blair's wharf and put them ashore.

At his request the Mary went then to the Carrie, picking up by the way, a barrel of apple-brandy floating on the

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water. She found on deck of the Carrie fourteen bags of peanuts which she took off and saved. She found the Carrie sunk deep in the water, with her bow slightly touching the bottom. She towed the Carrie to Blair's wharf and tied her up there when her master resumed control of her, she then brought the master and crew of the Carrie up to City Point and put them ashore. She placed the cargo which had been saved, and which was worth about \$150, in a warehouse subject to the order of the salvor. The Carrie was towed out of the channel to Blair's wharf by about 5 o'clock P. M. A large ocean steamer bound to New York from Richmond, was laying at City Point taking on freight, and was to leave to go down the river at about 6 P. M. Another large steamer from New York, bound up the river for Richmond was to come up later in the night. So also was a freight-steamer from Baltimore bound for Richmond to come up during the night.

If the Carrie had remained in the channel, adrift and without an anchor-light, all the chances were that she would have been run down and sunk. The weather was cloudy and cold and the night was dark. The river opposite Blair's wharf is about a mile and a half wide. The channel was comparatively narrow. In her water-logged condition the Carrie drew nearly ten feet of water.

The cost of the Carrie, shortly before the accident was \$5,400. She was under insurance for \$4,500. The cost of getting her afloat and putting her in repair afterwards at Norfolk, whither she was taken, was about \$3,000.

Upon this state of facts the owner of the Mary libelled the Carrie and such of her cargo as was saved, for salvage.

Jackson & Sands, for libellant.

Chas. S. Stringfellow, for respondent.

The following was the decision of:

HUGHES, J. This is plainly a case of salvage, and a case

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for a liberal salvage reward. The Carrie was in a helpless condition; her own crew powerless to save her and hopeless of doing so. Her master called upon the owner of the Mary to undertake the rescue of his vessel, and spoke of 50 or 75 per cent, of the value raised as the probable reward. The fact that no anchor was thrown out and no light put up, conclusively evidenced abandonment. It can hardly be said that in a case of abandonment in a river, with the land of each shore in sight, there was no *animus recuperandi*. But if this like abandonment had occurred on the high seas, the case would have been one of absolute derelict.

The vessel was in imminent peril. She was likely either to sink and to be crushed on the bottom by the powerful steamers soon to pass up and down; or if she had continued afloat, she was liable to be collided with and sunk by the same great vessels.

The mere fact that the work of saving occupied the Mary only two or three hours, does not materially affect the case. In the case of the *Blackwall*, 10 Wall., 1, where fire-engines from San Francisco put out a fire on the steamer in the harbor in thirty minutes, the supreme court of the United States sanctioned an award of many thousands of dollars salvage.

Really, the only open question in the case is; what shall be the amount of award. I consider the value of the Carrie after she was delivered at Blair's wharf was \$2,400. I will give a decree for a fourth of this value, that is to say, for \$600. As to the portion of the cargo that was saved, I will give a decree for half its net value.

Syllabus.

*United States District Court, Eastern District of Virginia,
at Norfolk, February 10, 1888.*

**ALLISON & ADDISON, AND THE VA. FIRE AND MARINE
INSURANCE COMPANY v. THE SCHOONER JAMES
MARTIN.**

Where a vessel is abandoned by master and crew under circumstances creating a suspicion that she has been deserted and scuttled and left to sink by them, the failure of her owners to examine half her crew who are disinterested in a libel for damages brought by owners of the cargo and their insurers is prejudicial to their case, if they do not account for their failure.

Where, in case of such an abandonment and such a libel, respondents allege that the misfortunes of their vessel originated in a collision at sea with another vessel, and yet fail to libel that vessel, when opportunity offers them, or to take any steps to secure the testimony of the officers and crew of the other vessel as to the collision, the fact that there was any collision at all being denied by libellant, such a failure is prejudicial to the case of the respondents :—this is especially so where a collision in the manner alleged by master and crew of the libelled vessel was physically and mathematically impossible.

Where a schooner, which has been dismasted at sea, with a hole cut in her deck, is abandoned by her crew; the master and mate protesting to those who rescue them that the schooner is leaking and sinking; although the fact was that she was not leaking seriously; was not sinking; and was found twenty-four hours afterwards riding safely at anchor at the place of the desertion, and towed into port by another vessel; *Held*, that, by reason of bad seamanship and negligence, the schooner is liable to the owners of the cargo, and their insurers for salvage paid on the cargo, and for damages sustained by its cargo while on the vessel at sea.

Sharp & Hughes, proctors for libellants.

Ellis & Thom, proctors for respondents.

NOTE OF EVIDENCE DRAWN BY THE JUDGE.

The schooner James Martin, 225 tons, was owned in Boston by several persons; Wm. H. Brown, her master owning an eighth part. This part was insured at \$800, and

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had been insured at that rate for twelve years. The schooner was twenty-five years old. In March last she took on a cargo of fertilizers, to the amount of 260 tons, consigned to Allison & Addison in Richmond, Virginia. This cargo was insured with the Virginia Fire and Marine Ins. Co., one of the libellants here. The fertilizer was worth \$40 per ton, or some six or seven thousand dollars.

When the Martin was about ready to set sail from Boston, Capt. Browne her master and part owner, found himself in negotiation for the purchase of another vessel. He telegraphed to a town in Massachusetts for Rowland Howes, and employed him to go on this voyage as temporary master of the Martin. The mate of the schooner was A. C. Browne, brother of the part owner and regular master, Wm. H. Browne.

The vessel was towed out of Boston harbor on the 14th of March, 1882, and sailed on her voyage. By midnight of the 23d March she was off Cape May, some six miles distant.

The wind was W. N. W.; she was going south, making for the Virginia capes.

Her master, Rowland Howes, testifies as to subsequent events, substantially as follows:

About midnight of the 22d March, we being close-hauled, on starboard tack, wind W. N. W. and going south, with reefed mainsail, and with foresail and jib-boom set, weather fair but cloudy, and a strong breeze, we were run into by a three-masted schooner, of about 700 tons; afterwards learned to have been the Wm. H. Baily of New York. She was standing northward and must have had the wind free. We saw her about 3 miles off. She was on the port tack. She was under full sail. After she had got nearly abreast of us she suddenly luffed up, tacked ship, and ran in under our lee, and struck us on our port bow. She carried away our jib-boom, cat-head rail and bulwarks, and damaged the top of the top gallant-forecastle. Both vessels had their lights set. It was a clear night. We were obliged to cut adrift the jib-boom and the sails attached to it to prevent damage

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to the vessel. All the rigging attached to the flying jib and the jib topsail boom was cut adrift, including the jib-boom guys on the starboard side.

We examined the rigging after the collision and found it in apparently good order. We then proceeded on our course. For the rest of the night the wind shifted around from W. N. W. to N. W., we continued under same sail as before. Next day, wind N. W. to S. W., went nearly around the compass and quite moderate. For three hours after the collision, until we got off Chincoteague, sea was comparatively smooth; that is, for the rest of the night after the collision and all the next day.

At 2 A. M. on the morning of the 24th, twenty-six hours after collision, a heavy sea had set in from the southward, wind S. W. by S. While we were on the starboard tack, both masts came suddenly down with a crash, "caused by the chain parting which the starboard jib-stay was set up to, and the lee on the port side of the bowsprit breaking which the port jib-stay was rove through." The foremast broke off about nine feet above the deck, and the mainmast at the saddle. The mainmast broke in three places. This happened at a distance of about six miles from Winter Quarter Light Ship. No one was on deck at the time but the mate, (A. C. Browne,) and another man. There were six men all told on the vessel.

We let go the small anchor soon after, but the chain parted. We then let go the large or sheet anchor with 70 fathoms of chain, and the ship swung round to the wind and sea. We then cleared away the spars that were hanging over the side of the vessel. The gaff and topmast and head of the mainmast went overboard; the rest of the masts were left on deck. They fell over to the port quarter. When the mast came down it broke the davit on the port side and stove the boat. The ship's boat was destroyed by the falling masts. No injury was done to the deck. The houses were injured to some extent. After the masts came down there was a reef breeze from S. S. W., the sea heavy, and the weather smoky, so that we could see but a

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short distance. The ship was leaking, but we could not discover the source of leakage. We pumped her out every 15 minutes for about 2 hours, and when we left her there was two feet of water in her hold.

We left her about eight hours after the masts fell, or 9 A. M. on the 24th March. The sea when the masts fell was such that the ship would take water over her bow lying at an anchor.

We left the ship on the boat of the steamer John Hopkins, Hallett master, (bound from Boston to Baltimore, via. Norfolk,) which came in sight on the morning of the 24th. We left the ship because she was entirely disabled and there was no suitable boat to help ourselves with.

I did not ask Capt. Hallett to take her in tow and carry her into port. The sea was too heavy. He had the privilege of taking her after we had abandoned her. I did not think it worth while to ask him about these matters. We left her on Friday. She was taken in tow on the next morning (Saturday) by the steamer Wm. Crane, Howe master, (bound out from Baltimore to Boston); and carried back to Norfolk. I went there from Baltimore, and saw her the following Tuesday afternoon, the 28th. When I landed from the John Hopkins I made no efforts to carry relief to the vessel and to save her. I thought she would sink. The entire pumping we did before we left her was equal to an hour. I did not ask the captain of the Hopkins to take off any part of the cargo."

The testimony of A. C. Browne, mate of the James Martin does not differ in substance from that of her master. He says that the crew all thought that if the Hopkins had not taken them off, they would have been all lost. He says that after they left their vessel they took no steps to save her, except that they left her anchored. They thought she would sink, and her crew all thought themselves lucky in saving themselves as they did. He says that his captain said to Capt. Hallett, of the Hopkins, that his vessel was sinking. He says that he thought that the collision did disable the Martin to some extent.

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There were six men on the Martin on this voyage. Only three were examined on the part of the owners, viz., Rowland Howes the employé of the part-owner Wm. H. Browne, A. C. Browne, the brother of this part-owner, whose interest was insured; and the steward, who knew, or affected to know nothing of the material facts of the collision, and of the falling of the masts.

The vessel, on being brought into Norfolk was found to have a hole cut in her deck about ten inches long and six inches wide tapering to a smaller size at the bottom. Her hatches were fastened down. The hole in the deck was a little aft of midship at the lowest point of the deck, where when loaded, it would be about 4 feet above the water. The scupper near this hole was found at Norfolk to be stuffed with rags and other rubbish. Efforts had been made to cut through the deck in and under the water closet in the cabin, but the deck was not actually cut through at this place. The schooner was towed from Norfolk to Richmond in charge of Mr. Cowardin, the president of the Insurance Company before mentioned, which held the insurance on the cargo.

On arriving at Richmond, port-wardens found the hatches properly fastened down. Fox, one of the witnesses, says the fore-rigging on the starboard side, lying on deck, bore every appearance of having been cut; and cut somewhere between the rail and the mast-head.

Witness Allison, one of the libellants, says the starboard stays of the foremast were cut. Allen, a witness and a stockholder in the insurance company, and an experienced sailor, says: The starboard fore-rigging had been cut eight or ten feet, or more, from the deck. The seizings of the forestay had been cut, which left it free to go. They were cut, all of them. The effect upon the masts, of cutting the seizings, would certainly be to carry them away over the side of the ship, if there was any motion of the vessel at sea. He did not think the schooner had been in collision, as the hull was not damaged; and certainly her jib-boom and bowsprit would have been carried away. From the

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general evidence apparent, he did not think his port bow indicated a blow from the outside. He saw no injury except at the cat-head, a space of six or eight inches. The rail by the cat-head was broken down, but there was no injury to the deck or plank sheer.

The cargo was found damaged to the extent of about \$12 a ton, chiefly at the part of the vessel under the hole that was cut in the deck. The vessel was not in a leaking condition, and had not been since taken in tow by the steamer Crane; at least not more so than vessels ordinarily are while loaded and making a voyage.

The insurance company, which is one of the libellants, had to pay \$1800 as salvage on the cargo, and \$2007 to Allison & Addison, the consignees, for damages to the cargo. The freight contracted to be paid to the ship was \$390. The insurance company paid towage bills and other expenses, nearly equal to that amount.

S. H. Matthews, one of the part-owners of the Martin, testifies, amongst other things, that "after hearing of the collision, he was told of a schooner lying at Charlestown, Massachusetts, which was loading with ice for Charleston, South Carolina, which was said to have collided with an unknown vessel. He went to see her, and had some talk with her master, who said a collision had happened. He found, upon examination, this schooner's main-stay was broken on starboard bow, and anchor stock broken, and various scratches on the hull of the starboard bow. After going to the custom house in Boston, where he made some examinations, he again saw the master, who admitted to him that he had been in collision about the point and time at which the Martin had collided. This was a three-masted schooner, the Wm. H. Baily, of New York. Matthews told the captain of the schooner that he had employed counsel in Boston to libel his vessel. The brothers of Matthews, who were part-owners of the Martin with him, also told the captain of the Baily that they were going to libel, and that he had better go to New York and prepare bonds, so as to be ready for the libel. The sequel was, that the schooner

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Bailey went away from Boston, was not libelled, and gave no bonds; and that no steps have been taken to libel her, either in New York, Charleston, Boston, or elsewhere.

Under a consent order of sale, entered by this court, the Martin was sold in Norfolk, and brought less than \$1500. It does not appear that any of her owners, other than Wm. H. Brown, had their interests insured, or had knowledge that W. H. Brown had employed a temporary substitute as master for this voyage.

The following decision was rendered by

HUGHES, J. The original libel in this case, filed on the 24th of April, 1882, by the owners of the cargo and their insurers, claims damages for tort charged to have been committed by the master and crew of the James Martin, in having cut away her masts, and cut holes in her hull, and abandoned her to perish at sea. The amended libel, filed at the hearing, claims damages from the failure of the master and crew to bring the vessel into port because of bad seamanship and the unseaworthiness of the vessel. The owners make a cross-claim for the freight contracted to be paid on the cargo.

When the schooner was brought into Norfolk, on the 24th of March last, her master and crew were under grave suspicion of having dismasted and scuttled their vessel, and deserted her at sea. When, on the day before, the steamer John Hopkins, from Boston for Baltimore, came in sight of them, and took the whole crew of the schooner on board, the master so impressed Capt. Hallett with the belief of the hopeless plight of the schooner alleged to be leaking and sinking, that he came away and brought her crew off, without deeming it worth while to make any examination into the true condition of things. When, twenty-four hours afterwards, the steamer Wm. Crane, from Baltimore and Norfolk for Boston, came near the schooner Martin, she was found not to be seriously leaking, and not to be sinking; and Capt. Howe, of the Crane, found no difficulty in doing, in the absence of the schooner's master and mate,

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what Capt. Hallett had not done when they were present: He took the schooner in tow, reversed his own trip, and brought her back to Norfolk. When the schooner arrived here she was found to have a hole cut in her deck, in its lowest bend downwards, nearest the water, about midships; and the scupper near it was found to be plugged up with rags. On being taken to Richmond, and unloaded of her cargo, the latter was found to have received its principal damage from water in that part lying just under this hole in the deck; a fact which indicated that the water causing this damage had come in through this hole, while the schooner was in a position to be swept over by the sea; this latter fact indicating that the hole had been cut in the deck while the schooner was out at sea, sometime before she was brought within the capes of the Chesapeake.

Mr. Matthews, one of the part-owners, claimants and respondents, was in Richmond about the time the Martin was taken up there; and negotiated a dismissal of the libel for salvage, which had been put upon the schooner here on her first arrival in Norfolk. He could not have failed to hear at Richmond the charges against the master and mate of the schooner, which are embodied in the original libel before me. He must have appreciated the importance to the reputation of these two officers, and to the character of the schooner's owners, especially of Wm. H. Brown, of meeting these charges by the evidence of the entire crew of the Martin, and by the evidence of all on board the three-masted schooner with which he states she had been in collision on the night of the 22d of March, 1882. Naturally this court had a right to expect that all the crew of the Martin would have been examined in such a case as this. Yet only three of them have been examined; and the failure to examine the rest is wholly unaccounted for, although it is in proof that one of those others was for some time in a hospital at Norfolk. Such an omission, unaccounted for, in cases like this, has always been looked upon by admiralty courts as prejudicial to the case of the vessel charged to be at fault. Moreover, the witnesses actually

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examined are those least disinterested in the suit. The part-owner, whose interest in a schooner twenty-five years old is insured, and who did not make this particular voyage with his vessel as master, telegraphed from Boston for a temporary substitute, and sends this substitute on this voyage as temporary master; this part-owner's brother being mate. This temporary master, and this mate, are the only persons examined of this crew, except a steward, who seemed to have been always below deck asleep; who insisted that he knew nothing, not even the names of his companions of the crew; and whose intelligence was probably as dark as he represented it to be.

Again, it was of the highest importance to the case of the respondents in this court, that they should have libelled the three-masted schooner with which they claim the Martin to have been in collision off Cape May; if for no other purpose, at least to establish the fact of collision, and to show that the fault was not that of the master and crew of the Martin. The evidence before me is wholly *ex parte* as to that other vessel, and the testimony of the crews of vessels which have been in collision, is proverbially unreliable. The testimony of the crews of each of these two vessels, as to that collision, ought to have been taken under oath and under cross-examination; otherwise it would have been in that litigation worthless. How can it be any better in this, where it is the *whole truth* that is essential to the formation of a just conclusion. But although the owners of the Martin themselves testify that they had abundant opportunity to libel the three-masted schooner, which they call the Wm. H. Baily of New York, yet they have not done so.

In Boston they tried to maneuver with the master of the alleged schooner, to induce him to get out of the way of their libel. They could have libelled her during several days while lying at or near Boston. They told her master that they had arranged to libel her after a certain fast day, and to get his vessel ready; and they say he went off with his schooner before they got their libel out.

If, therefore, these people have a good case, they have

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failed to support it with the evidence most necessary and proper for its vindication. That is to say, they have omitted to examine three of their own crew to sustain the statements alleged in their defense, and these three were the men who were wholly disinterested in the result of the suit. They have not libelled the schooner which they claim to have collided with; nor examined any of her crew as to the alleged collision; although they insist that in this collision originated the disaster to their vessel. Nor have they accounted for these omissions.

When we come to examine the testimony of their own master and mate as to the causes of the misfortunes of the schooner Martin, their explanations prove to be radically unsatisfactory. They say they were running southward abreast of and six miles off from Cape May, on the night of the collision, with wind W. N. W. (when it was two points abaft their beam) and that they were close-hauled and on the starboard tack. They say that the three-masted schooner was standing northward with wind W. N. W. at that time; and yet, that she was sailing with a free wind and on a port tack. These statements are by physical and mathematical necessity, untrue. Moreover, these officers say that the vessels collided by the Baily's starboard bow running into the Martin's port bow; and Mr. Mathews testifies that the port bow of the Martin, as he saw it at Richmond, was rubbed and abraded; and that the starboard bow of the Baily as he saw her in Boston was likewise rubbed and bruised, and that he saw a workman obliterating the mark or bruise on the Baily. Now it is absolutely impossible that such a collision could have occurred between these two vessels unless one or the other of them had entirely reversed her course; and there is no mention or intimation of such a reversal in the testimony of either the master or mate of the Martin.

Counsel for the Martin suggests that she might have been sailing at the time of collision on a course to bring her under the land, say S. W. by W.; and that such a course would bring her close to the wind. But she was then

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opposite Cape May north of the mouth of the Delaware Bay, and such a course as that suggested, would have taken her into the mouth of the bay. She could not have been aiming to enter the bay; and even if she had been, her port bow would then have been turned still further away from the other schooner and her course would have rendered it still more impossible for the Baily to have run into her port bow with her own starboard bow. In short, I find it impossible to believe the statements of the master and mate on this subject;—a fact which naturally and necessarily discredits their whole testimony.

The Martin was sailing with the wind free; the Baily was sailing close to the wind; and the rule of the road (Rule 17, Rev. Stat. sec. 4233,) made it the duty of the Martin to keep out of the way of the Baily. If, therefore, there was a collision it was by fault of the Martin; and she is responsible for all the consequences to the cargo for that fault.

The statements of the master and mate as to the dismasting of the schooner are almost as incredible.

They admit that they examined the rigging of the schooner shortly after the collision; and found the essential parts of it intact. They proceeded on their course for three hours on a rough sea; but after that period, all the way to Chincoteague, some sixty or seventy miles, the sea was "comparatively smooth;" and the wind was "moderate."

The wind was shifting all the rest of the night after the collision, all of the next day and the first part of the next night. So that it had got entirely around the compass. There is no complaint of a storm; though the sea was heavy and the wind was blowing a reef breeze.

At 2 P. M. on the morning of the 24th, the masts suddenly went down. What was the cause of this misfortune? The testimony of the witnesses examined at Richmond was, that the starboard fore-rigging was cut; so is that of Mr. Cowardin, who was on board the Martin from soon after she was brought into port at Norfolk, until she was taken to

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Richmond. This rigging was cut some nine or ten feet above the deck. The masts fell over in the direction two points on the port quarter; showing that the fore-rigging on the starboard side was at fault.

The vessel had gone on her course for twenty-six hours after the collision. Examination had shown that the essential parts of the rigging were intact shortly after the collision. Though it had been subjected to greater or less strain for the first three hours after that event, it had stood the strain. Then there was a "smooth sea," and a "moderate" wind for twenty hours, during which there could have been no strain. Then without the agency of any *vis major*, in the shape either of high storm or heavy sea, the masts went down opposite the quarter where the rigging was found afterwards to have been cut. This is not a criminal prosecution, in which a court must require full proof of crime; but a civil suit, in which a court is bound to decide upon the preponderance of evidence positive and circumstantial. With every disposition to presume innocence, I cannot persuade myself that the falling of these masts was the result of any *vis major* of navigation; especially as it occurred at a desolate point on the coast where violence to the vessel could find more of a chance of immunity and concealment than at probably any other point on the North Atlantic seaboard.

But even if the masts did fall by stress of weather and sea, still, there was no justifying cause for the subsequent abandonment of the schooner by the master and mate.

It is true that the chance of escape was cut off by the accidental destruction of their boat in the falling of the masts; but where was the necessity for escape at all? They could safely remain on board until help came from some quarter; and there was nothing in their condition to throw them into a panic of fright. If they were under the influence of such a panic before the Hopkins came in sight, they were needlessly so; and the certainty of rescue should have calmed them. Their vessel was not sinking; it was not

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even leaking considerably ; but only to the extent to which the best of vessels are liable at sea. But they did more than escape. When they got aboard the Hopkins their trepidation should have entirely subsided ; and they violated their duty as seamen, to their ship, to its owners, and to the cargo, by so exaggerating the condition of their vessel, in their statements to Capt. Hallett, as to induce him to sail away without attempting to save their ship.

This is all proved by the sequel, Capt. Howe, of the Crane, having found the schooner riding safe at anchor, without much water in her hold, not in a leaking condition, and capable of being towed upon a right rough sea into harbor. The Boston steamers all stop for several hours at Norfolk, both on their trips in and out. When the Hopkins came into this harbor with the crew of the Martin on board, the first duty of the master and mate of the Martin was to take steps to have her looked after and saved if practicable ; which it certainly was. They took no such steps. So far as any evidence exists, they gave no publicity in Norfolk to the fact that their vessel was anchored out at sea, within a few hours sail of Norfolk, in distress and danger. We have no evidence that they did anything or said anything while here for the rescue of their vessel, and they went on to Baltimore, where they would seem to have been equally reticent and inactive.

I am of opinion that whatever accidents, described in the evidence as having happened to the *James Martin*, happened by the fault of her master and crew ; especially that the collision, if it occurred at all, was by their fault ; and that the dismasting of the vessel was either through their act, or through their negligence or incompetency in not properly staying the masts previously to their falling.

I am of opinion that the vessel was abandoned unnecessarily ; was, in fact, deserted by her master and crew under circumstances in which their duty as seamen demanded that they should have stood by her ; at least to the extent of prevailing upon Capt. Hallett to do, under their supervision, what Capt. Howe did on the next day after they had deserted her.

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I am of opinion that, on being brought by the Hopkins into the port of Norfolk, the master and mate of the schooner ought to have taken effective steps for bringing their vessel into port, and should have hired a powerful wrecking tug, and gone themselves out to the place of anchorage; and themselves brought their vessel and her cargo into port, and saved salvage.

I am of opinion that, having failed to do this at Norfolk, they should have done it in Baltimore.

I am of opinion that, by omitting this natural and obvious duty, they themselves furnished strong evidence to sustain the suspicion that their desertion of the ship was premeditated and criminal.

I am of opinion that the James Martin, in consequence of this bad seamanship of master and crew, is liable for the amounts paid for salvage and as damages to the cargo by the libellants.

As to the question of the freight: this was a clear case of an abandonment at sea of the vessel and cargo by the master and crew, without intention to retake possession. Where this is done, and where the owners of the cargo have done no wrongful act themselves, it is settled law that the ship-owners can maintain no claim to the freight. The contract of affreightment, indeed, is not at an end; because it exists to form the foundation of a suit for damages to the cargo, by its owners, as in the case at bar.

The damages that will be awarded in this cause, from the negligence of the master and crew, will be \$1800 for salvage paid, \$2007 for damages to the cargo, and costs of this suit. The libel is *in rem* only, and the vessel brought, on a sale under a consent decree, only about \$1500. Now if the proceeds of this sale had been sufficient to cover this whole claim for salvage and damages, together with costs, I might be bound to listen to argument on behalf of the owners for the freight. But the large excess of the amounts claimed by libellants over and above the proceeds of sale, and the large deficiency for which the libellants have no recourse here whatever, preclude such an inquiry in this proceeding.

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I will sign a decree denying the respondents' claim for the freight, and awarding to the libellants the amounts above indicated, to be paid as far as may be out of the proceeds of the sale of the ship.

*United States District Court, Eastern District of Virginia,
at Norfolk, February 10, 1883.*

THE MARIE ANNE.

- *1. The rule of fixed proportions in salvage cases no longer obtains in England, and is going out of favor in America.
2. The true rule is a payment of all expenses incurred by the salvor, and in addition a sum by way of bounty, the amount of which must vary with the amount of property saved, and with the special circumstances of each case.
3. An ocean steamer, valued at \$150,000, with a valuable cargo and a large complement of passengers and crew, picked up about 130 miles east of Cape Henry, a brigantine, 34 days out, which had lost by yellow fever four men out of a crew of seven, and towed her into Hampton Roads. The value of the property saved was \$7700. The court awarded \$3750 and costs as salvage.

Butler, Stillman & Hubbard, for libellants.

Sharp & Hughes, for respondents.

NOTE OF THE EVIDENCE DRAWN BY THE JUDGE.

The steamer Bellver, Antonio Planas master, left New York on the 18th of October, 1882, for Limon, Carthagena, and other ports on the Carribean sea. At 6 o'clock on the morning of the 20th, she saw the Marie Anne, a French brigantine, showing signals of distress, and went to her. Most of the crew of the Bellver were Spanish, but Rossello, the first mate, spoke French. At the direction of the captain, Rossello spoke to those on board the Marie Anne in their own language. He asked them what they wanted.

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They replied, "we want to be saved." He asked if their captain was on board. They replied, he was dead. He asked if they had any navigator. They replied, none; adding, we are but three, all the rest of the crew and the captain were dead. They requested to be taken on board the Bellver. When denied, they requested that their vessel and themselves should be taken into port. Their captain and the rest of their crew had died of yellow fever.

The captain of the Bellver held a conference with his officers and passengers, and it was decided to tow them into port. They were then about 130 miles off the capes of the Chesapeake. The Bellver had on board a crew of forty men, seven cabin passengers, and probably other passengers. She had on a very valuable cargo, paying \$5000 in freight.

The brigantine had left San Domingo on the 16th of September, 1882, bound for Havre. She was a vessel of 222 tons. After having gone 300 leagues in the Atlantic, on her voyage, she had, on the 6th of October, changed her course, and had been making for Delaware bay ever since. The three men found on her, when met by the Bellver, had neither of them had the yellow fever. According to the testimony of the libellants, and of the health officer at Norfolk, they were feeble, emaciated, and more or less ill. They had all, from necessity, remained on deck night and day nearly the whole of the time since leaving San Domingo.

When hailed by the Bellver the principal sails of the brigantine were up; but were most of them torn, and were badly trimmed. The vessel and sails indicated the possible condition of the crew; though the ship herself was in a seaworthy and sound condition. They had a short time before hailing the Bellver, hailed a sail-vessel but had received no relief.

The hawser with which the brigantine was first towed by the Bellver was one of her own, and soon broke under the growing power of the wind, which already stiff, blew harder and harder for 15 to 20 hours afterwards. When

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the first hawser broke, two hawsers were used; both belonging to the brigantine; but about 11 o'clock of the night of the 20th, the gale had become quite stiff and the sea quite heavy, both these hawsers broke. Afterwards, the Bellver used her own hawser in bringing the brigantine into Hampton Roads. During the night of the 20th, when the two ships had got separated, the Bellver kept near the Marie Anne until morning. The three men on board the latter, having taken heart since their rescue managed their vessel very well, during the night and the period of separation.

The brigantine was brought into Hampton Roads on the 21st; and was anchored off Sewell's Point. In a few days afterwards she was taken up to the quarantine station near Crany Island. The health officer of Norfolk, Dr. Galt, found two of the men feeble and sick; and anxious to be taken from their vessel to the city hospital; but he was unable to gratify them in this respect because of their vessel being infected with yellow fever. They seemed very anxious to leave her.

The testimony of the witnesses examined respectively for the steamer and the brigantine is conflicting, as to the helplessness of the crew of the latter when she was hailed by the steamer; and as to the capacity of her crew to navigate their vessel. The crew of the brigantine were not examined until a month after their rescue; when they had recovered their health, strength and courage. When first seen by Dr. Galt, the health officer of Norfolk, they and their vessel were in condition corresponding to the representations of the witnesses examined for the Bellver. On arriving at Hampton Roads, and when the Bellver was about to leave them, they had signed for Capt. Planas, at his request, a testimonial in French, of which the following is a translation.

"We, the seaman of the brigantine Marie Anne, of St. Vaast on a voyage from Saint Domingo to , certify that on the morning of the 20th of October, at six o'clock, we descried a steamer and hoisted our flag requesting

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salvage assistance ("sauvetage,") and said vessel on seeing our signal bore down upon us and asked, what we wanted, to which we replied, to take us aboard or to conduct us to port, since we had no navigator aboard, and did not know how to save ourselves and our vessel.

"However, we sign this certificate at the request of the captain of the said Spanish steamer 'Bellver' in the port of , where we arrived conducted by this vessel on the 22nd day of October 1882.

The seamen of the brigantine, Couespel Raschieri.	}	The second of the Marie Anne, Lemarchand."
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In their testimony, given a month afterwards, in Norfolk, Lemarchand and Couespel, admitting that they had read and understood this testimonial before signing it, yet denied the truth of its statements. The tenor of their testimony is, that they did not need assistance when taken in tow by the Bellver; that they could have easily brought their vessel into port; that at no time had they any thought of leaving her; that they were never in need of salvage service; that their vessel, its sails, and rigging, were in good and effective condition; that they themselves were well and strong and hopeful; that Lemarchand was an experienced navigator, possessing a diploma as second mate from the college of St. Malo; that he had taken all necessary observations while the brigantine was at sea; and knew where his vessel was when rescued; and that they in fact, in hoisting a flag of distress and hailing the Bellver, had no purpose of asking for help and for salvage service, but wanted and asked for nothing but "onions, chickens and vegetables." The alleged diploma of Lemarchand was not produced though called for.

Their testimony proves far too much in this direction and I find myself unable to credit it on the two essential points,—whether their vessel needed salvage service, and whether they asked it of the Bellver.

The testimony of the libellants and of circumstances is
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positive to the effect that the vessel was without a navigator; that her crew had no intelligent conception of where they were; that a heavy gale came on soon after she was taken in tow, in which she was likely to have been driven on the dangerous shore north and south of Cape Henry; that they earnestly asked to be taken on board the Bellver; that they required salvage service for themselves and vessel; and that they, owing to their own feeble condition, physical and mental, were in exigent need of it.

The brigantine was insured in France for forty thousand francs (\$8,000.) She was appraised here under orders of this court at \$4,000 as her value in Norfolk. Her cargo, which consisted of mahogany and other woods and some dried fruits, was assessed as worth \$3,645.22 in Norfolk. A statement by items of the expenses of the Bellver incurred by deviation is filed by her counsel showing these to have been \$1,014.

HUGHES, J. This is admitted to be a case of salvage.

An ocean steamer, the Bellver, bound from New York to a port within the tropics, having on board a large crew, a number of passengers, and a cargo paying a freight of five thousand dollars, came in sight, on the morning of the 20th October last, of a sail vessel holding out signals of distress. The steamer went to her relief and found that the vessel, which was the French Brigantine Marie Anne, was infected with pestilence; that within a few days past it had lost all except three men of its crew, with yellow fever, including its master; that it was floating upon the ocean without chart or navigator; and that it had shortly before been refused relief by another ship; that the three men left on her were practically impotent with long watching, fatigue and despondency. These men begged to be taken on board the steamer; they demanded that at least their vessel and themselves might be saved and taken into port.

They had sailed from San Domingo 800 leagues, for Havre, had then changed their course, and had now drifted to within 180 miles of Cape Henry.

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Counsel for libellants well say that here was a case worse than one of derelict. If it had been merely a ship abandoned and adrift, the master of the *Bellver* would have been at liberty either to put a crew upon her who might navigate her into port, or to leave her to her fate. But in this extraordinary case his duty as a seafaring man forbade either of these measures. He had no right to put any of his own men upon a vessel infected with one of the most deadly of diseases, and one peculiarly fatal at sea. He could not abandon to their fate three worn-out, helpless human beings, begging to be saved. Nor could he take these poor people on his own ship, crowded as it was with men, and bound within the tropics, where, if the germ of yellow fever were once planted upon his ship, it would surely fructify in disease, and destruction to his business.

I think the master of the *Bellver* adopted precisely the course imposed upon him by all the circumstances of the situation.

In answer to the entreaty of the people on the *Marie Anne* to be taken on board his own steamer, he did what the authorities of Norfolk did three days afterwards, in answer to their petition to be admitted into the city hospital: he refused. The protection of many from pestilence is a higher duty than that of gratifying even the moderate desires of a few who are afflicted. His refusal was an act of duty, and not an act of cowardice.

The master of the *Bellver*, taking great care to protect his own vessel from infection, and declining to subject any of his own crew to risk by putting them on board the infected ship, did the only thing he could do with safety to his own vessel: he towed the *Marie Anne* into Hampton Roads.

I cannot concur with Judge Curtis, in his opinion intimated in the case of the *Alphonso*, hereafter cited, that a person may safely go upon the deck of a ship infected with yellow fever, if he take care not to go below into the hold. Experience has shown that remaining at night on the deck of such a vessel subjects to the contagion as surely as going

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below decks either by day or night. A historical proof of this fact was given in the instance of the *Ben Franklin*, which was the ill-fated steamer that brought the yellow fever to Norfolk, in 1855. This ship, after being, as was thought, thoroughly cleansed and disinfected, and after lying for a while down in the Roads, took on wood from a lighter. Owing to a rainstorm, which came on late in the afternoon, two laborers from the lighter slept over night on the deck of the Franklin. This was their only exposure to the epidemic; but they took the fever, and both died, from this single night on the deck of what had been supposed to be a disinfected ship.

By deviating from his course in the manner which has been stated, the master of the Bellver incurred serious risk and cost. His own steamer was very valuable; as was also his cargo. The loss of three days' time to an ocean steamer running on a fixed schedule, is always an important matter. Coming into any sort of contact with a vessel infected with yellow fever is most seriously perilous to a steamer plying within the tropics. Bringing a vessel in tow into the capes of the Chesapeake, under a high wind blowing upon the land, is a hazardous adventure to one not regularly navigating these waters. When we consider all these things, we cannot avoid the conclusion that the steamer Bellver subjected herself to serious peril and cost in undertaking this salvage service.

As to the Marie Anne, she was found practically derelict. She had reversed her course in mid-ocean, after making a great part of her voyage; and had floated back before the winds for hundreds of miles. She had no chart. No one upon her deck knew where she was, except that it is probable that LeMarchand had an approximate apprehension of the latitude he was in. Her crew were too feeble, and too emaciated or despondent, even to trim sails. Most of the sails were torn; and all were hanging on the rigging in a slovenly manner, when the brigantine was spoken by the Bellver. Consequently, in the gale which soon after came on, she was in condition to be lost. It is absurd to contend

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that her voyage, before she was spoken by the Bellver, had demonstrated the proficiency of her crew as navigators. If it proves anything, it shows only that a vessel may live many days at sea adrift without a navigator. LeMarchand, the only man among the crew with any spirit remaining in him, had nothing but an ordinary map to guide him; but he could not have made any nautical use of it, as he did not know, until he was informed after he had got into harbor, that this map had on it the lines of longitude. It is certainly true that one person may take the longitude of a ship unassisted; but it is equally certain that LeMarchand had not performed this office at all while on board the Marie Anne.

I think it unreasonable to insist now that LeMarchand was a navigator. When first spoken by the Bellver, and especially and particularly asked whether she had a navigator on board, which was a most material inquiry, it was replied from the Marie Anne, with iteration, that she had not. After arriving in Hampton Roads, and when the Bellver was about to leave the brigantine, and her master naturally desired to take with him to his owners, from the saved crew themselves, evidence of the service he had taken the responsibility of deviating from his course to render them, LeMarchand, after reading a paper written in his own language, which he signed and asked his companions to sign, (who did sign it), LeMarchand stated in this writing that the Marie Anne had no navigator on board. It was clearly an afterthought, when, some week or more afterwards, he began to claim to be a navigator, vouching in proof a diploma from St. Malo, which has never been produced.

Though I can readily conceive how the procurement of a certificate from a saved crew by salvors may, as a rule, deserve severe reprehension; yet I can see nothing in the tenor of the certificate which was obtained by the master of the Bellver from the crew of the Marie Anne, or in the circumstances under which it was obtained, to reprehend. It was but a brief record of what were, up to the day of its date, a few undisputed facts.

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Returning to the main subject in hand, I think the preponderance of chances were that the Marie Anne would have been lost and cast away on the dangerous coast above and below the Chesapeake capes, during the gale which prevailed on the day and night after she was taken in tow by the Bellver, if she had been left to herself. I think, therefore, this was a highly meritorious case of salvage; and I am restrained from allowing a maximum reward, only by the circumstance of the comparatively small value of the subjects saved contrasted with that of the instruments which effected the salvage.

In respect to vessels found helpless at sea, there are two classes of cases of salvage:—one, in which the saving ship, usually a sail vessel, puts one or more of her own crew on board and leaves them to take the distressed vessel into port; and the other, in which the saving ship, being a steamer, herself takes the distressed vessel in tow and carries her into port. Where the former expedient is allowed, the salvage adopted by the admiralty courts has not been as large, for obvious reasons, as in cases of the latter class. But when the latter method has been pursued, the salvage awarded has usually been large, sounding in thousands of dollars or pounds sterling.

It may be remarked also, as to salvage cases which have been decided in the English high court of admiralty, in later years, that the old rule, of adjusting the amount of the award by proportions or percentages of the values saved, has been more and more disregarded; and I think it may now be assumed that the rule is in England obsolete. I admit, however, that in the United States, we are still bound to pay a sort of conventional deference to it.

The tendency, nevertheless, here as well as in England, is, to cut loose before the old procrustean rule, and to award as salvage, first the amount due on the principles of *pro opere et labore* and *quantum meruit*; and, second, to add to this, a *reward* graduated to the circumstances of each particular case; this *reward* or *bounty* being diminished from a generous amount, only in cases where the value saved is ex-

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ceptionally small compared with the values employed in the salvage, and the merit of the service rendered.

In the case of the *Janet Mitchell*, Swabey, 111, the award was £1200, (\$6000) for furnishing a navigator to a distressed ship.

In the case of *The Roe*, Swabey, 84, the award was £200 (\$1000) for supplying additional seamen to a ship disabled by being short of hands.

In the case of *The Golondrina*, L. R., 1 Adm. & Eccl., 334, the award was £1800, (\$9000,) for furnishing a navigator, to go from Chili to Swansea.

In the case of *The Alphonso*, 1 Curtis, 376, where two vessels were off shore, and one of them supplied a seaman to the other to bring her a few miles into port; yellow fever being on board the latter; the award was \$750, and would have been increased to \$1050, if the master who furnished the seaman had been willing to receive the additional amount.

In the case of *The Charles*, 2 Sprague, 48, \$5500 was allowed for bringing a ship from the middle of the Atlantic into Boston, and furnishing her a navigator.

In the case of *The Martin Luther*, Swabey, 287, £1500, (\$7500,) were allowed for rescuing a vessel from distress under circumstances of considerable risk, by a service of 24 hours.

In the case of *The Andalusia*, 2 Mar. Law Cases, 215, £510, (\$2550,) were allowed for towing a disabled steamer, for eight hours, under circumstances of danger.

In the case of *The J. L. Bowen*, 5 Benedict, 296, \$3,000 were awarded for navigating a ship short of hands, into port, in fair weather.

In the case of *The Meg Merrilies*, 3 Haggard, 846, £750, (\$3750,) were allowed for towing a dismantled vessel 105 miles for seventeen hours.

In the case of *The Traveller*, 3 Hagg., 270, £1000, (\$5000,) were allowed for a meritorious case of towing a helpless vessel.

In the case of *The Akbar*, 5 Federal Reporter, 456,

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\$3,600 were allowed for navigating a brig with valuable cargo from Havana to New York.

In the case of *The Cleopatra*, L. R., 3 Prob. Div., 145, £2000, (\$10,000) were allowed for towing a derelict ship, ninety miles into port, amid much danger.

In the case of *The Skiblander*, L. R., 3 Pro. Div., 24, £900, (\$4500) were allowed for furnishing one navigator who navigated a fever-stricken brig with most of her crew prostrate, three thousand miles, from the gulf of Mexico to England.

In the case of the *D. W. Vaughn*, 9 Benedict, 27, \$1140, were allowed for towing a disabled schooner from a few miles off Long Island shore to New York.

In the case of *The Minnie Miller*, 6 Benedict, 117, the steamship Pacific was allowed \$2250 for towing a disabled brig found sailing with a jury-mast, 175 miles into New York, in a salvage service.

In the case of *The Wexford*, 3 Benedict, 119, a pilot boat was allowed \$1500 for towing a dismasted and distressed brig for nine days into port. The award would have been larger, but the amount saved was only \$3800.

In the case of the *Albert*, Law Journal N. S. Adm., 191, £400 (\$2000) was awarded by Dr. Lushington, on appeal, for standing by and towing for nine days a schooner that had been damaged in a storm off the Dutch coast. Respondents denied that it was a salvage service; and the value saved was only £1680.

Most of these cases, it will have been observed, were cases in which the services of mere individuals, as seamen or navigators, were thus liberally rewarded; but seldom with reference to the values saved, except where the amount was so inconsiderable as to make a stinted allowance necessary. Among those cited there are but few cases of ocean steamers, running upon fixed schedules, turning from their course, under the behests of humanity for the generous purpose of conducting distressed vessels into port.

This latter was the service rendered by the *Bellver*, under the appeal of humanity and at the imperative dictate of duty. Her conduct deserves the most emphatic com-

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commendation of the court; and, sitting here in an admiralty court, at this central port between the great marts of American commerce, on one hand, and the tropical portions of the continent on the other, which are no less fruitful in pestilence than in all the elements of wealth, I dare not, I have not the courage, to decree, in view of its influence in future cases, a reward of less than \$2600 over and above costs and expenses, to a costly steamer, laden with a valuable cargo, and having full fifty persons on board, for picking up and bringing safely into port an infected vessel, found far out at sea, with a crew cut down by fever to three worn-out, emaciated men, demoralized by misfortune and fright, and drifting they knew not where, at the mercy of the elements. I am sorry that a just award bears so large a proportion, as the one due in this case, does to the value saved, which is only \$7700. It is to be considered that this is the cash auction value at Norfolk, and much below the mercantile value both of the ship and cargo. The ship is foreign-built, and cannot obtain an American registry, and so her valuation here at only \$4000 is only half her insurable value in France. It is true that in salvage cases we are bound to decree upon values in the port of the forum; but, if a large proportion be awarded, the hardship in this case is only apparent.

I repeat, therefore, that I am restrained in the present case, in fixing the amount to be allowed for this meritorious service, by the inconsiderable value of the property saved.

The expenses of the *Bellver*, incurred by deviating some three days from her course, and as incidental to the service, were about \$1000. I think the reward due for performing this service ought to be at least \$2750, besides expenses. And therefore I will award the round sum of \$3750, and the costs of this suit. As the counsel for the libellants represent all the persons claiming to participate in this award, I will leave to them the apportionment of the amount awarded among the several claimants as they may think just, subject to revision and correction by the court after conference with them.

Syllabus.

*United States District Court, Eastern District of Virginia,
at Norfolk, March 12, 1888.*

HARNEY & CO. v. STEAMER SYDNEY L. WRIGHT.

- *1. The implied admiralty lien is a mere right to sue and arrest the ship as being herself the contracting and responsible party. It arises from the acts or needs of the ship herself, independent of any question of ownership or agency, or responsibility of those in whose charge she may be. It exists independent of possession, and is entirely dissimilar to the common law idea of lien. It is a misnomer to call such a right a lien.
- 2. This lien, or right to sue and arrest, only arises (1) when the ship is herself the immediate and direct recipient of the supplies, and (2) when these supplies are apparently proper and necessary, and are furnished in good faith. When these requisites concur, the presumption arises, in case of foreign vessels, that the supplies were furnished on the credit of the ship.
- 3. A vessel is liable *in rem* for supplies furnished in a foreign port, on the order of a charterer in whose possession she is at the time.
- 4. The authorities on the subject of the origin of liens for supplies reviewed.
- 5. The cases of *The Secret*, 8 Fed. Rep., 665, and *The Norman*, 6 Fed. Rep., 406, distinguished.

IN ADMIRALTY.

By a charter-party, dated on the 23d day of September, 1880, the Delaware Transportation Company of Philadelphia, chartered to John E. Reeside of Washington city, the steamer Sydney L. Wright, to be used on the waters of Albemarle Sound, in North Carolina, on a route from Elizabeth City to Edenton, from the 1st of October, 1880, until the 1st of May, 1881. The price of the hiring was a fixed sum per month; the steamer was to be delivered to Reeside at Norfolk city, and after her service was ended, he was to return and deliver her at Norfolk. The captain, engineer and fireman of the steamer were to be nominated and appointed by the company, and the captain and engineer were to be paid by the company; which was also to furnish the oil and tallow for the engine and the running

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lights. Reeside was to pay all other expenses, including the board of the entire crew. There were other stipulations not material to the questions involved in this suit. The company contracted to let, hire, deliver, and give the use of the steamer to Reeside.

The steamer was in due time delivered to Reeside and put upon the route designated by the charter-party. Reeside had obtained a mail contract from the post-office department; and his principal object in chartering the Wright was to carry the United States mail on that route.

The steamer was employed in this service from October, 1880, until early in March, 1881; when, in consequence of some delinquency on the part of Reeside in paying the charter price for the use of her, the Delaware Transportation Company ordered her home; and she left Elizabeth City for Philadelphia, on or about the 9th of March.

The Sydney Wright had, for two or three months before then, been supplied with the coal which she used, by Harney & Co., of Elizabeth City, the libellants in this suit; and the coal had been put on board of her by Harney & Co., from their wharf, which was the one used by the steamer at Elizabeth City; and this coal had been charged to the steamer by Harney & Co., on their books, in the original entries.

The coal which was to be used by the Wright for her trip home, and which was taken on board on the 8th of March, was obtained from Harney & Co., and paid for by a draft of her captain, in their favor, on the company in Philadelphia.

When the Wright left Elizabeth City, Reeside was there, and Reeside and Harney, one of the libelling firm, looked over together Reeside's accounts with the firm, on the night of the 8th of March; and on this occasion Reeside gave to Harney & Co. his acceptance, payable in Washington, at four days, for \$325.80. This amount Reeside admitted to be due; but a receipt was taken for the acceptance, which Harney says was given on account. The acceptance was never paid, and is still due. The principal indebtedness—

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probably the exclusive indebtedness to Harney & Co., was for coal for the Sydney Wright.

The steamer went direct to her owners in Philadelphia. Capt. Stoddard, one of the firm of Harney & Co., residing in Norfolk, shortly after this time sent a claim for coal furnished the Wright, amounting to six or seven hundred dollars, to counsel in Philadelphia, for collection. This claim embraced the amount of the unpaid acceptance of Reeside, before mentioned. After some considerable lapse of time, the counsel in Philadelphia informed Capt. Stoddard that the claim was not a good one against the steamer. The claim was duly presented to the Delaware Transportation Company.

On the 20th of December, 1881, after the claim had been sent to Philadelphia and returned, as just stated, the Delaware Transportation Company sold the Sydney Wright to Edward J. Galwey, of New York, for \$6500, and received the purchase money in cash. Mr. Galwey is the claimant in this cause.

Early in February, 1882, the Wright came to Norfolk on her way southward; which was her first appearance in Norfolk after passing through, going home, nearly a year before. The libel in the present suit was thereupon filed and the steamer arrested. She was soon released on stipulation or its equivalent. The libel claims \$748.12; but having been taken out in an emergency, it is since found that that amount is greater than what is claimed as due for the coal furnished the Wright at Elizabeth City. The amount really demanded is \$575.65. As between Reeside and Harney & Co., the question is, whether \$325.80 or \$575.65 is the amount due. This question depends upon another one of fact, viz.: whether a wheelbarrow, which was used by Harney & Co. in measuring the coal delivered from their wharf to the steamer, held 230 or 280 pounds. If it held the latter amount, \$575.65 is due. If it held only the former amount, then only \$325.80 is due; for which sum the acceptance of Reeside was given. The acceptance itself is lost; but a release of it is filed with their libel by Harney & Co.

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Sharp & Hughes, for libellant.

Harmanson & Heath, for respondent.

HUGHES, J. As to the question of fact in this case, I think there can be no doubt, from the evidence, that the wheelbarrow referred to held one-eighth of a long ton, or 280 pounds of coal; and, therefore, that the amount due the libellants, and unpaid, is \$575.65.

The main controverted question in the case is, therefore, the question of law: whether the charterer of a chartered vessel can bind her for necessary supplies in a foreign port. Here, the general owner was a resident of Philadelphia; and the special owner, or charterer, a resident of Washington city. In Elizabeth City, North Carolina, therefore, the Sydney Wright was indisputably a foreign vessel. Neither her general owner, nor her special owner, nor her master, nor any of her principal officers, were residents of North Carolina. Reeside was only occasionally at Elizabeth City; the general owner of the steamer, never. Reeside was a man of no means, or credit, or even of general acquaintance there. The sequel developed that he was insolvent; for he did not pay the charter price of the steamer which he was using in the execution of a cash contract; and he did not pay even for a two-months' supply of the coal consumed in propelling the steamer. There was nothing in North Carolina to form the basis of credit to the enterprise in which the boat was engaged, except the steamer herself; and the evidence shows that in point of fact the coal now sued for was charged to the steamer, when and as it was delivered by the barrow load. The general owner, who was a stranger there, had sent her into Albemarle Sound for a seven months' service, in charge of one who was a stranger there and an insolvent; who was without personal credit, and without the right to personal credit; sent her there in disregard of the homely admonition in the Black Book of the Admiralty, which is the horn-book of maritime law. (Twiss's edition, vol. 8, p. 261): "A managing owner of a ship or vessel must beware to whom he lets it."

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It would seem that this was a clear case of the liability of the vessel for a necessary supply; but it has been so strenuously denied, in argument at bar, that the admiralty lien attached in this instance, that I feel called upon to go somewhat into elementary principles in dealing with this denial.

It seems to me that the denial rests upon a misapprehension of the true nature of an admiralty lien. A tendency exists in the minds of many counsel, of a few text-writers, and I may add, in rare instances, of judges of courts, to confound the admiralty lien with the common law lien, from which it differs both in origin and essential character.

Thus assimilating two different things, they naturally infer that the two respective liens must be created in like modes by like agencies; and, looking to the analogies of the common law, are apt to fall into the belief that, in order for the admiralty lien to attach to a vessel, it must be created by the owner or by an authorized agent, by means of some act of one or the other of these persons, more or less formal, positive and solemn; that is to say, in some such manner and through some such instrumentality as that by which a common law lien is created; whereas one of the essential incidents of an admiralty lien is, that it is the vessel herself which acts in its creation, she herself being the contracting party or tort-feasor,—ownership, proprietorship, agency, attorneyship, and the like ideas, being ignored.

I use the phrase admiralty lien, although in truth the word *lien* is not properly an admiralty term. Except in the English and American law of admiralty, the term *lien* can hardly be said to belong to the admiralty vocabulary or nomenclature. At common law there was no lien except in conjunction with the possession of the thing which was the subject of it. A tailor could hold the garment, a livery keeper the horse, the hotel-keeper the baggage of a customer, until his claim against the owner arising from expenditure upon the object of the lien was satisfied. Statute law has extended the lien so as to allow it in favor of the

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mechanic, who has built a house for another; in favor of the judgment and execution creditor upon the property of the judgment debtor, real and personal; and in many other instances expressly provided for by statute. It has been only by express statute, however, or through the instrumentality of equity in following the law, that the lien at common law has been extended, in special cases, beyond possession.

Wholly different from all this is the admiralty lien. The creditor of a ship has in general no possession: and the admiralty law, which is a universal law, cannot be enlarged by local statute. What it was in its origin it is now, except so far as it has been gradually improved and enlarged by enlightened judges and jurists. And, therefore, what is in modern times called the admiralty lien has no affinity with the common law right of lien. At common law, the right of the lien-holder was to retain and hold the thing as property. In the admiralty, the right of the creditor of a ship is to find, sue and arrest her, as if she were a living person.

At common law the right to sue a person and to hold his property bound by lien, were distinct and different. In admiralty there is but one right; which is, to proceed *in rem* against a ship as a living person, by name; a right to sue and arrest the ship. This admiralty right to sue and arrest a ship, is simply the same right as that which the creditor had in early times to sue and arrest the *corpus* of his debtor. There were conditions under which the debtor could be thus dealt with, and conditions under which he could not be thus dealt with; and the same is the case with the admiralty right to proceed *in rem* against, to sue and arrest, the ship. In early times the debtor could be sued and arrested by virtue of the mere fact that he *prima facie* owed the debt; but the law has been modified so as to authorize arrest only as against non-residents or debtors about to abscond. The admiralty law has in this respect been somewhat modified; but not to as great an extent as the municipal law has been ameliorated in regard to the arrest of debtors.

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It is plain that these last mentioned rights of procedure, which are similar in origin and perfectly analagous, are wholly different from the common and statute law right of lien; and it would have been no more improper under the old law to say that a creditor had a lien on, in the sense of a corporeal property in, the person of his debtor, than it is now to say that a creditor has a corporeal lien upon a ship for his claim, before his service of process *in rem* upon her, and actual arrest. As in the one case, the right of the creditor was simply to sue and arrest; so in the other case, the right of the creditor is simply to sue and arrest. As in the one case there was no lien, in the common law meaning of the term, before actual arrest; so in the other case, there is in the eye of the admiralty law, no corporeal, possessory *lien* before actual arrest.

An admiralty lawyer of the continent would, I am sure, be at a loss to comprehend the term *lien* as often used by American writers in respect to a ship, although used in cases in which the right to proceed *in rem* in admiralty were fully recognized. It is true that there are corporeal and actual hypothecations in admiralty by which liens are established upon ships in the fullest sense of the common law lien; as for instance, in the case of bottomry bonds; but the ordinary right to proceed *in rem* in admiralty, against a ship, independently of such hypothecations, is of an essentially different character.

A ship is a traveller and stranger; and if no ship ever went beyond the horizon in which her owner, her master, or her charterer was personally known to local dealers in ships' supplies, there would never have been such a system of laws as that known over the world as the admiralty code. These laws all relate directly to ships as voyagers, strangers and travellers; and the system has grown up in the interest of commerce; and has been adapted to the convenience and requirements as well of ships themselves, as of the classes who deal with shipping.

One of the fundamental principles of the admiralty law is, that when a ship, this stranger and traveller, comes into

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a port and is there furnished with the repairs or supplies apparently proper for keeping her afloat in the service of commerce, the ship herself being the contracting party, she may herself be sued as a living person for the things furnished, irrespectively of the condition, as to responsibility, or credit, of any individual on board, whether he be owner, or master, or charterer. It is a fundamental principle of the admiralty law, that the material man who ministers to the needs of a ship, whose papers are regular, may ignore, as the admiralty law itself ignores, the persons in immediate charge of the ship; and, be these persons ever so responsible and well known and wealthy, may sue and hold the ship herself for the price of the services or articles supplied to her. This is a law of commerce, as necessary to the welfare of ships and the prosperity of commerce, as it is just to the persons who minister to the wants of ships. It is true that home or domestic vessels are, in many localities, excepted from these wholesome rules, on the principle that *cessante ratione cessat et ipsa lex*; but I have no concern with that part of the subject in the case at bar, which respects a foreign vessel.*

The necessary and just law of commerce, to which I have been referring, is what confers on the creditor of a ship, the right to proceed *in rem* against her—to sue and arrest her. The body of laws embracing this right is not local. It is universal. It is not an outgrowth of the English or American laws of navigation, or of any local system of jurisprudence whatever. It is as old as the most primitive navigation known to history, and as ancient as any code on earth. It has force everywhere, and follows a ship around the globe, with lengthening chain, into every port known to commerce which she may enter.

This right to sue and arrest a ship is as tenacious as the law conferring it is universal. If supplies are furnished her to-day in Norfolk and she sails out of port to-morrow to circumnavigate the earth, this liability to suit and arrest

* On the subject of liens on domestic vessels see *The Raleigh*, 2 Hughes, 44.

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will follow her everywhere though she be absent for years and traverse a course as long as the belt of the equator. Through every moment of her absence and at every point in her journey she will continue liable to the right of her Norfolk creditor, to sue and arrest her for his demand. How incongruous, how preposterous, therefore, is the idea of lien in the corporeal and possessory sense of the common law, applied to such a right! How vain is the endeavor, how gross the mistake, of assimilating this right, to the county-court idea of a lien, registered in a local deed-book!

As to the conditions under which the right to sue and arrest a vessel arises, on the presumption that credit for supplies is given to her, it is obvious, first, that the ship must herself be the immediate and direct recipient of the supplies or repairs furnished to her; that is to say, she must be in or near the port where they are furnished, and must receive directly herself, for her own use, the things furnished. It would be too great a stretch of the privilege conferred upon the creditor by the admiralty law, to allow him, on the legal presumption that credit was given the ship, to sue and arrest a vessel to which he has sent supplies at a distance of hundreds of miles, on her own credit. There may be no such vessel. She may not be at the port to which the supplies are sent. She may not be in need of them. They may never reach her. In such a case, obviously, the convenience and requirements of commerce do not demand, nor would they be subserved, by such a stretch of the law of credit in admiralty, as to embrace cases in which so many contingencies may intervene to intercept supplies from the ship.

In the next place, the repairs or supplies should be apparently proper and necessary for the vessel in the condition in which she may be, when receiving them; and they must be furnished, in good faith, for the use and benefit of the vessel.

As a third requisite, it is sometimes contended, that the supplies must be furnished specifically and distinctly on the

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credit of the vessel. Whatever may be the law on this head, as to a domestic vessel, I do not think it applies to a stranger and foreigner. It is the policy of the admiralty law to discourage such a doctrine as to a foreign ship, and not to listen to evidence tending to show that supplies have been furnished to such a vessel on any other than her own credit. To permit such an enquiry, to allow a question to arise whether the ship or some person were credited by the material man who ministered to her wants, would be of most pernicious influence upon dealings between ships and material men; and, by encouraging litigation on such questions, would create apprehensions of suits in commercial communities which would seriously embarrass foreign vessels coming into port for supplies. The presumption of law is, that supplies proper for a foreign ship have been furnished on her own credit; and the burden of proof is thrown upon respondents to show positively to the contrary. The exception sometimes set up to this general rule, of cases in which, though the vessel be foreign, and her owner also foreign, yet her charterer lives and conducts business in port, and has full control of the vessel, and is known by the material man to have this control and to be responsible for the vessel's contracts, will be adverted to in the sequel.

The authorities supporting the principles announced in what has been said above, are numerous and conclusive.

I shall cite, however, only such as bear directly on the case at bar. In the case of the *City of New York*, 3 Blatch., 187, Mr. Justice Nelson held, that the agent of the charterers of a vessel could bind her for supplies, even though the libellants knew that the vessel was under charter. In the case of *Thomas v. Osborn*, 19 How., 22 *et seq.*, the U. S. supreme court held, that the master, though charterer, could bind the ship. The reasoning on page 30, that the owner could protect himself by stipulations, is worthy of special note.

In the *Golden Gate*, 6 Amer. Law Register, 273, 276, 278, Mr. Justice Catron and Judge Treat recognized the right

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of a charterer to bind the vessel. So, in the same case when in the court below; *Newberry*, 308. So in the case of *Flaherty v. Doane*, 1 Lowell, 150, where it is said, "Admiralty liens depend more on services rendered the ship than on any question of agency."

In the case of *The Patapsco*, 13 Wallace, 329, a libel for coal furnished on the order of the charterer was sustained.

In the case of the *Phæbe*, 1 Ware, 268, it was held, that the master, though charterer, could, on a contract of affreightment, bind the ship, and that "the owner has his remedy against the charterer."

In the case of the *Neversink*, 5 Blatchford, 589, Mr. Justice Nelson held a vessel liable for supplies of coal furnished apparently at the master's orders. The ship is liable for supplies furnished in a foreign port, though the owner is there and ordered them in person, if he was non-resident and they were furnished on the ship's credit. *The Kalorama*, 10 Wallace, 204.

In the case of the schooner *Freeman*, 18 Howard, 182, it was held that the charterer could bind the vessel for the performance of contracts of affreightment. If so, then *a fortiori* can he bind her for those supplies without which the contract can not be performed.

The power of a master to bind the vessel and her owners even though chartered, is recognized in *Bass v. O'Brien*, 12 Gray, 477; and *The Cassius*, 2 Story, 81 and 98. See also *The Nestor*, 1 Sumner, 78; *The Sarah Star*, 1 Sprague, 453; and *The Monsoon*, id. 37; also Mr. Etting's Essay, 21 Amer. Law Reg., 2; in note; *The India*, 14 Federal Reporter, 476; and the *S. M. Whipple*, id. 354. The case of *The India*, is in all material respects precisely like the case at bar. That of the *Whipple* is like in its principles.

As to whether the coal furnished to the Wright was necessary, the fact that a vessel is in a foreign port, itself creates the presumption of necessity as to supplies furnished. See *The Washington Irving*, 2 Benedict, 818; *The Eclipse*, 3 Bissell, 99. And the fact that the supplies are ordered by the master in a foreign port is sufficient proof of

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the existence of a necessity for the supplies and for credit, in the absence of fraud or collusion. See *The Grapeshot*, 9 Wallace, 136; *The Guy*, a case much like this at bar, id. 758; *The Lulu*, 10 Wallace, 192; *The Emily Souder*, see paragraph 8 of syllabus, 17 Wallace, 666; Mr. Etting's Second Essay, 21 Amer. Law Reg., 85, notes 2 and 4; the steamer *James Guy*, 1 Benedict, 112, affirmed 9 Wall, 758; *The Plymouth Rock*, 7 Benedict, 448, affirmed 18 Blatch., 505; and *The Metropolis*, 9 Benedict, 83.

Nor does the presence of the owner of a vessel in a foreign port, where supplies are ordered by himself, or there being ordered by himself, if he be non-resident, defeat the lien; for this is abundantly shown by the cases *supra*.

The respondent relies upon the cases of *Benecke v. The S. S. Secret*, 3 Federal Reporter, 665, heard at the same time with *Maxwell v. Same*; and *The Norman*, 6 Federal Reporter, 406.

As to Benecke's libel, it was for supplies furnished to and shipped by her charterers in New York for the steamer at Jacksonville, Florida, between which port and certain foreign ports the Secret was running. The charterers were residents in New York; the supplies were delivered and charged to them. The Secret was at the time at Jacksonville, or on the route on which she was running. All the facts of the case were in combat with the presumption of law that the supplies were furnished on the credit of the vessel. The Secret was not only not in port, but a thousand miles off; the supplies were, of course, not put upon board of her by the libellant. The vessel was not, therefore, in port under conditions in which it is the policy of the law to encourage the supplying of the needs of foreign vessels; and I think the decision of the court, in this case, against the libellant, was in entire harmony with the authorities which I have cited.

The claim of Maxwell against the same vessel was of the same character. The supplies were furnished at the order of charterers resident in New York, and were charged to them. When a part of them were furnished,

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the steamer, it is true, was at New York, but she was about to sail for Jacksonville. She was allowed to sail while the goods were not yet paid for. The bill for the goods was not sent to the charterers until several days after the steamer had sailed. The facts of the case were all in the teeth of the presumption of law, that the supplies were furnished on the credit of the ship; and placed the case beyond the reason and policy of the law encouraging the furnishing of needful supplies to foreign ships. The claim of Maxwell was in principle identical with that of Benecke; and the decision of the court was in harmony with the general principle of admiralty, presuming credit to be given the ship, in proper cases for such a presumption.

The case of the *Norman* was not so plainly an exceptional one to the general rule. The supplies were furnished in New York, on the order of charterers resident in New York, to a vessel, owned indeed in Boston, but registered in New York. The vessel was running between New York and Nassau; and was in the possession, use and control of the New York charterers; who, if not technically, were actually her owners *pro hac vice*. The ship was thus practically divested of the foreign character. She was virtually a domestic vessel, owned *pro hac vice* by home charterers. These special facts strongly conflict with the general presumption of law, that supplies furnished to a foreign ship, in a port where owners, charterers and master are all strangers, are furnished on the credit of the ship; and seem to take this case out of the general rule. I am not disposed to question the propriety of the decision rendered in it; especially as there may have been facts unreported that may have influenced it largely; but I regret that it was not rested on the leading facts to which I have alluded. Where supplies are furnished to a ship which is virtually a domestic ship, on the order of owners or charterers who are residents of the port where they are furnished, and who are well known to dealers in ships' supplies in that port, it may well appear that the presumption

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of law, that they were furnished on the credit of the ship, is overthrown; and I think a court may well say to a libellant, "you shall not be allowed to manufacture a presumption of law not existing in your case, by charging supplies to a ship, and affecting ignorance of facts which belie the presumption." Exceptions like these, not only do not discredit a great and sacred principle, but really sustain it.

I do not think these last cases named are similar in their essential features to the one at bar, or conflict with the general principle of the liability of a chartered vessel for supplies furnished in a port in which she herself, her charterer, and her owners, are all strangers.

I will decree accordingly

*United States Circuit Court, for the District of Maryland,
April Term, 1866.*

OWNER OF STEAMER CAMBRIDGE, APPELLANT, v. OWNERS
OF SCHOONER OMEGA.

*In a collision between a vessel at anchor in a river out of the usual course of navigation, with either no light or an improper light, and no anchor watch, in a fog so thick that the usual lights of vessels could not be seen more than 150 yards off, and a steamer with compasses somewhat out of order, with her look-out in an improper place, and running at a speed of seven or eight miles an hour, both were held in fault, and the damages were divided.

CHASE, C. J. The schooner Omega, from Baltimore for Kent Island, on the 17th of November, 1865, came to anchor, the wind being very light, on the southwest side of the Patapsco, in a part of the river out of the usual course of navigation.

About four o'clock on the morning of the 17th, before daylight, the steamer Cambridge ran into and sunk her.

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The libellants claimed complete indemnity for the loss sustained, about \$1200. The district court was of the opinion that both vessels were in fault, and divided the damage equally.

The evidence shows that the Omega had no signal light. If she had any light at all it was a red light, displayed as if she were under sail. Nor had she any look-out that night: on the contrary, both captain and mate seem to have been roused from their berths, either by the whistle of the Cambridge or by the actual collision; for both leaped on board the steamer, in that cold November morning, in shirt sleeves and with their feet in stockings. And yet she was anchored where, though out of the most usual course of navigation, vessels passing up and down the river might very possibly come, and where her navigators were bound to use extraordinary care to guard against collision. But instead of extraordinary care, I am obliged to say, there was extraordinary negligence. Clearly the Omega was in fault; and if alone in fault ought to bear the whole loss, which the precautions required by law might have averted.

But the evidence does not permit me to say that the Cambridge was free of blame. She seems to have been out of the regular course. Her compass was in bad order, and allowance was necessary for variation, and the pilot was probably mistaken as to precise allowance required. There was also a heavy fog that night; so heavy that the white signal light of a vessel at anchor required to be so bright as to be visible at a distance of at least a mile, could be seen from the steamer not farther than one hundred and fifty or two hundred yards. With such a compass, and in such a night, approaching a great port of commerce through a river, in which many vessels were certain to be met or passed, peculiar obligations to prudence rested upon the officers of the Cambridge. I am satisfied that her lights were in proper trim and place, and that her officers were competent and vigilant; but I am not quite satisfied concerning her look-out, and not at all satisfied concerning her rate of speed.

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Her look-out was either among or behind some cattle on the forward deck; when he should have been at the stem, or so near as to have the best possible opportunity for seeing any object ahead. And there is some reason to doubt his fitness for the duty; though hardly enough to make his unfitness a good ground for decision against the steamer.

What is more serious against the steamer is her speed. She was moving, some witnesses say, eight miles, and none say less than seven miles an hour, under the circumstances already described. At this speed, and when the brightest light of a ship at anchor could not be seen more than four hundred and fifty or six hundred feet off, the risk of collision is necessarily imminent. In less than a minute from the time it could be seen, the steamer would strike any vessel immediately ahead, unless, being seen itself, the collision might be avoided by dexterous co-operation in the navigation of both vessels.

This rate of speed, under the circumstances, cannot be sanctioned without disregard of well-established principles essential to the security of property and life. If the Cambridge was not bound to stop during the density of the fog, she was at all events bound to proceed very slowly, taking every precaution against accident. Such would be fairly considered moderate speed in the sense of the act of April 29, 1864.

By the best consideration I have been able to give to the case, my mind is brought to the same conclusion that was reached by my brother, the district judge, and the same decree *mutatis mutandis* will be entered here as was entered in the district court.

*United States Circuit Court, for the District of Maryland,
November Term, 1867.*

**THE UNITED STATES *v.* A CANOE, GOODS, CHATTELS
AND MONEY.**

1. A decree in a prize cause directing the payment of money claimed to be subject to condemnation into the registry of the court to await the further order of the court is not a final decree. The only final decree in such a case is the decree which terminates the custody of the court over the fund.
2. Under section 5 of the act of July 13, 1861, prohibiting commercial intercourse between the loyal and insurgent states, gold coin is included in the words "goods and chattels, wares and merchandise," and is forfeited by an attempt to carry it into an insurgent state.

CHASE, C. J. This cause comes before us on appeal from the district court. The libel charges that a canoe called the "Lapwing," with a lot of goods and chattels, consisting of two canvas sails, seven barrels of borax, and seven hundred and seventy dollars in gold, was, on or about the 20th of July, 1862, proceeding from parts of the United States not in insurrection to a part of Virginia which was in insurrection, and that the canoe and cargo including the gold, were seized by the proper officers for the violation of the act of July 13, 1861, and the act of May 20th, 1862, prohibiting commercial intercourse between the loyal and rebel states, and thereupon the libel brought condemnation. No claim was put in on the hearing below for any part of the property seized.

The first decree of the district court recites the facts proved. From this recital it appears that the canoe, with the borax on board, was found lying in a creek in St. Mary's county, in Maryland, and seized on behalf of the United States by a party of cavalry. No person was on board the canoe, but in the woods at a little distance, a man was captured who admitted that he was the owner of the canoe and cargo; that he was a physician residing in Virginia, and

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that he intended to take the borax to Virginia for sale. The gold was found upon his person.

Upon these facts the district court expressed the opinion that all the property except the gold was liable to condemnation, but that the gold was not so liable, and thereupon at the March term, 1864, a decree was made condemning the canoe, the borax and the canvas sails, and directing that the gold be deposited in the registry to await further orders.

The decree further directed the sale of the property condemned and the deposit of the proceeds, after payment of costs, in the registry to await further orders.

Subsequently in June, 1866, Daniel W. Vowles presented a petition claiming to be the person from whom the gold was taken, and praying an order that it should be paid over to him. The identity of the claimant was admitted, and an order was made for the payment of the money agreeably to his prayer. From this order the United States appealed.

The record does not exhibit the evidence upon which the district court acted, but counsel on both sides admit the correctness of the statement of facts made by the district judge.

It is also admitted by the appellee, and this admission is the only evidence before us in addition to what was before the district court, that the gold seized upon his person, along with himself was proceeding to an insurrectionary state without a legal permit.

This is the case, and the first question arises upon a motion to dismiss the appeal on the ground that the decree at the March term, 1864, was final, and was not appealed from within the time allowed by law.

If this be so, the present appeal must, without doubt, be dismissed. But was the decree of March term, 1864, a final decree as to the gold? It is true that the learned district judge in his opinion stated quite distinctly that in his judgment the gold could not be condemned. But the decree makes no final order concerning it. On the contrary its

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direction is that the gold be deposited in the registry to await final order. We cannot doubt that after this order it was quite competent for the district court, had the judge changed his opinion, to make an order condemning the gold and directing its payment into the national treasury either directly or after conversion into national currency by sale.

There can be no final decree concerning a fund which remains in the custody of a court subject to further orders except one which terminates that custody.

The only final decree in this case therefore relating to the gold was that made upon the petition of Vowles, and directing its payment to him. It is not questioned that the appeal from this final order was in time.

The motion to dismiss must therefore be overruled.

This brings us to the merits of the controversy.

The fifth section of the act for the collection of duties and for other purposes, approved July 13, 1861, prohibits all commercial intercourse between the citizens of states and parts of states in insurrection, and citizens of other parts of the United States, and provides that "all goods and chattels, wares and merchandise" "coming from" an insurgent state or "proceeding to" such state "by land or water" shall be "forfeited to the United States," unless protected by the license or permission provided for in the act.

It is clear upon the evidence that the gold was "proceeding to" an insurgent state; indeed the fact is expressly admitted.

The only question before us therefore is, do the words "goods and chattels, wares and merchandise" include gold coin?

Now, nothing can be more certain than that in general these words do include money, whether of gold or of any other kind. Bouvier's Law Dictionary, 224. The word "goods" has the same signification as the word "bona" in the civil law, under which name [Wheaton's Law Lexicon, 441] is comprehended almost every species of personal property. Tisdale & Harris, 20 Pickering, 18. It is true that accord-

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ing to some authorities money cannot be taken in execution upon a *fieri facias* against the goods and chattels of a judgment debtor; but the reason is, not that money is not included under the ordinary sense of the words goods and chattels, but that it is not vendible. Lord Mansfield called this "a quaint reason," Douglas, 231, and it deserves a harder name. The contrary doctrine is expressly declared by the supreme court of the United States in *Turner v. Kendall*, 1 Cranch, 133.

There is, to be sure, a citation by Mr. Justice Story in 2 Story, 53, of a case from 1 Carr. and Payne, 310, to the effect that an indictment for embezzlement of money alleged to be the money of certain directors vested by statute "with all the goods, chattels, furniture, clothing, and debts" of the corporation was not sustained by proof that the money belonged to the corporation, for the reason that the words "goods and chattels" did not include money. But on referring to the book I do not find that the point was passed upon by the court. It was only made by counsel and reserved with other points by Baron Parke for decision by the twelve judges, and the case was finally adjudged (1 Moody's Crown Cases, 15) on one of the other points without the expression of any opinion on the question supposed by Judge Story to have been decided. It is possible that the learned judge did not examine the case. He cited it by a wrong name, *Rez v. Burrell*.

That Mr. Justice Story did not himself adopt the doctrine that "goods" do not include money is apparent from the case of the *United States v. Moulton*, 5 Mason, 544.

In that case he held expressly that "personal goods" include not only coin but bank notes. The same doctrine was affirmed in *United States v. Murray*, 1 Cranch Circuit Rep., 142.

On the whole it seems clear upon authority and upon sound reason that the prohibition in the act of congress extended to coin. It were strange indeed, if an act, intended to prevent all unlicensed commercial intercourse between the loyal and the insurgent parts of the country

Syllabus.

permitted the unrestricted carrying of coin, the chief instrument of such commerce, to the latter from the former. No such construction of the act can be allowed unless required by clear words.

And the mode of conveyance cannot affect the legal consequences of the fact. The most valuable goods are very often carried upon the person, especially when the object is to elude the vigilance of guards and officers, or to escape the consequences of being engaged in prohibited traffic. Daily experience during the late civil war then illustrated and daily experience in the revenue service now illustrates the truth of this observation.

It has already been observed that it is part of the case here, not so clearly if at all established in the district court, that the gold coin in question was proceeding to a part of Virginia then in insurrection.

A decree must therefore be made condemning it as forfeited to the United States.

United States Circuit Court, for the District of South Carolina. April 21, 1883.

THE UNITED STATES v. J. A. MINGES.

- *1. Section 4601 U. S. Rev. Stats., forbidding the harboring of deserting seamen, is to be read in connection with, and is limited by the words of Section 4612, and applies only to the harboring of deserters from American vessels, and not to the harboring of foreign deserting seamen.
2. The only remedy provided in case of foreign seamen deserting is the extradition process and procedure provided by section 6290.

INFORMATION, Sec. 4601 Rev. Stat., U. S., to recover pecuniary penalty.

District Attorney Melton, for the United States.

Opinion.

J. P. K. Bryan, for defendant.

BOND, J. The demurrer in this case raises the question whether it is an offense against the United States to harbor seamen deserting from a vessel of a foreign power.

The information alleges that the seamen harbored belonged to the bark Dagnal, but does not allege that the Dagnal was an American vessel.

The prosecution contend, that the words of sec. 4601 Rev. Statutes, U. S., "any seaman belonging to any vessel" under which this information is filed, are unlimited, and apply to cases of desertion from domestic and foreign vessels.

Upon examination of the statutes, however, the court is of opinion that sec. 4601 is to be read in connection with and is limited by the words of section 4612, which provides that in the construction of this title (*merchant seaman*), the word *seaman* shall be taken to be one employed, etc., "on a vessel belonging to any citizen of the United States," and the word "vessel" shall be understood to comprehend every description of "*vessel* to which the provisions of this title may be applicable." Surely "Title LIII. *Merchant Seamen*," Rev. Stat., is not applicable to foreign vessels.

This conclusion is further confirmed by reference to the merchant shipping act of 1790 (from which sec. 4601 Rev. Stat. is taken), which refers in all its provisions to American vessels and American seamen.

The remedy which by treaty with foreign powers, the United States gives in case of *foreign* seamen deserting from *foreign* vessels within the jurisdiction of the United States is contained in sec. 5280 Rev. Stat., U. S., whereby upon demand of resident consul, etc., and by procedure as therein indicated such foreign seamen are arrested and delivered up on extradition process to the consul, to be sent back to the dominions of such foreign power, etc.

When the provisions of this statute (5280) are exhausted, the government of the United States has fulfilled its obligations with foreign powers under the commercial treaties

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providing for extradition of deserting seamen. It has not contracted in any of such treaties to punish the harborer on this soil, nor has it so provided in its own statutes.

It is therefore ordered that the demurrer be sustained and the information dismissed.

RULES OF THE DISTRICT COURT

FOR THE

DISTRICT OF MARYLAND.

The following rules are adopted as the "Rules of the District Court of the United States for the District of Maryland," to take effect on the first Tuesday of December, A. D. 1879, except as to cases pending before that day, and, except as to such cases, all other general rules heretofore in force are rescinded.

1.

**Delivery of
papers.**

No original paper shall be by the clerk delivered out of the office, to any person whatsoever, unless by special permission of the court.

2.

**Order of
proceedings.**

On the first day of each term of the District Court, the original docket, and immediately thereafter, the trial docket, shall be called, for the purpose of making such entries thereon, as may be necessary and proper, and for ascertaining the cases that will be contested. On the second day of each term the original, and immediately thereafter, the trial docket shall be called peremptorily, and the causes tried in their order, unless continued by consent, or legal ground for continuance be laid. After the jury shall have been discharged there shall be a peremptory call of the admiralty docket, when the cases shall be called in their order, or be dismissed as it may be, unless continued on legal ground shown therefor. The legal rights of the United States will not be considered as affected by this rule, nor will it receive such construction as will prevent the court taking up a case out of order by consent.

3.

In all arguments in cases of admiralty jurisdiction no more than two counsel shall be heard on the same side, and neither shall occupy more than two hours, unless permission of the court be first obtained; and in common law cases the rule on this subject shall be the same as prescribed by the United States Circuit Court for the District of Maryland.

Argument
in admiralty
and common
law cases.

4.

This court will hold its sessions, when engaged in jury trials, from 10 o'clock A. M. to 3 o'clock P. M. of each day, and when sitting in admiralty, from 10 o'clock A. M. to 2 o'clock P. M., but for special cause shown in any case the sitting may be continued beyond the hour named, in the discretion of the court.

Sessions of
the court.

5.

The requisites for admission to practice as attorney, counsellor, solicitor or proctor of this court shall be the same as prescribed for admission to practice in the United States Circuit Court for the District of Maryland.

Admission
of attorneys
&c.

6.

In respect to all common law causes in this court the practice and general course of procedure, when not otherwise controlled by the laws of the United States or of the State of Maryland, or by any special rule, shall conform, as nearly as may be, to the practice for the time being of the United States Circuit Court for the District of Maryland.

In common
law causes
practice
same as in
Circuit
Court.

7.

Process in admiralty, *in personam*, shall be made returnable to the regular or stated term of the court; and process *in rem*, and process *in personam*, *with a clause of attachment if the defendant cannot be found*, may be made returnable to any day in the same term or in the next term of the court occurring after fifteen days from the time of the issuing of the same.

Process in
admiralty —
when return-
able, &c.

8.

When to
answer.

In all cases, whether *in rem* or *in personam*, where property has been attached and stipulated for, or where the defendant has been summoned, the claimant or owner of the property so attached, or the defendant (as the case may be), shall file his answer to the libel on or before the first day of the term occurring next after the issuing of the process, or on the day of the return of the process when made returnable to a day in the next term after the issuing thereof, unless further time be allowed by the court.

9.

Marshal to
give notice
in rem.

The time for the Marshal to give notice in cases *in rem*, as required by the ninth admiralty rule of the Supreme Court, shall be fourteen days.

10.

Stipulations
how better
security may
be required.

In all cases of stipulations in civil and admiralty causes, any party having an interest in the subject matter may move the court on special cause shown for greater or better security, giving the opposite party or his counsel not less than two days' notice thereof, unless a shorter time is allowed by the court.

11.

Marshal to
publish seizure
in what
paper.

The public notice of the seizure or arrest, and the time assigned for the return of the process and the hearing required to be given by the Marshal, by the ninth of the admiralty rules of the Supreme Court, shall be by notice, inserted daily for fourteen days, in the Baltimore Daily American and Commercial Advertiser.

12.

Security for
costs.

Every libellant non-resident of this State may be required to give security for costs within the first twenty days of the term to which the process is returnable, under penalty of having his case dismissed, unless the court for cause shown shall allow further time.

13.

In all libels filed by non-residents of this State, the libellant shall give security for fees before issuing process in the case, and, in default of such security, the proctor ordering the process shall be held answerable for the fees payable by such libellant.

Same.

14.

Libellant must close his testimony before the respondent begins, and afterwards no other evidence can be offered by the libellant, except what is strictly rebutting, or except evidence as to some new fact which has come to the knowledge of the libellant since he closed his testimony.

Order of proceedings in trials.

15.

In all appeals from the decrees of this court in admiralty, the appeal, to operate as a supersedeas, must be prayed and the bond filed within ten days from the day of the filing of the decree, and the bond must be in a sum double the amount of the decree; where the appeal cannot operate as a supersedeas, the bond will be in a sum sufficient to cover the costs of the appeal, and this sum is fixed at three hundred dollars, unless otherwise specially ordered in any case.

Appeals.

16.

Whenever a vessel is attached under a proceeding *in rem*, and shall be ordered to be sold under an interlocutory order, and the proceeds directed to be deposited in the Registry of the Court to await its further order, any one having a claim against the said vessel will be required to present the same by petition filed in the said case, and not by way of an original libel.

When vessel sold claims to be presented by petition.

17.

Whenever a vessel is attached under a proceeding *in rem*, and is in the hands of the Marshal, no stipulation having been given, any one having a claim against the vessel will be required to present the

When attached and not stipulated Marshal have notice of claims filed.

Stipulation to be in double amount of claim.

same by petition filed in the said case, and not by way of original libel, unless otherwise ordered by the court; and in such cases the person having the claim will file with the Marshal a memorandum of the name of such person and the amount claimed. And the Marshal, before discharging the vessel on stipulation, as provided for by the 941st section of the Revised Statutes, will require a stipulation in double the amount of all the claims made by such petitions in favor of said petitioners, as well as a stipulation in favor of the libellant in double the amount of the claim made in the libel.

18.

Commissions to take testimony.

The clerk is authorized to issue commissions to take evidence upon the application of either libellant, defendant or claimant, or their counsel; *provided* the party applying shall serve a copy of the interrogatories upon the adverse party or his counsel at least five days before the commission issues. If the parties or their counsel cannot agree upon the name of a commissioner the court will name him; *and provided* there shall be no continuance of the case for the want of the return of said commission, unless proper cause be shown for the continuance thereof.

No continuance for want of a return.

19.

Informations for forfeitures.

Whenever the District Attorney shall file an information under the 3453d and 3459th sections of the Revised Statutes, claiming to enforce a forfeiture of goods, wares, merchandise or articles, for the causes set forth in the former of said sections, and the same have been previously seized by the Collector or Deputy Collector, and have been delivered by him to the owner, upon bond, as provided for in the latter of said sections before the filing of said information, and such bond has been deposited with the District Attorney, or where the said property has been sold by the order of the Collector, and the proceeds paid into court to abide its final order, the District Attorney shall state these facts in his libel of information, and the clerk shall issue a notice to the owner, claimant and securities (where

there are any), informing them of the pending of the said proceeding, to be served by the Marshal, and when not found, publication to be made by him as in other cases of libels *in rem*.

20.

Whenever, on the call of the original docket, a judgment of forfeiture shall be entered for want of a claim and plea, no execution shall issue for ten days; during which time the judgment of forfeiture will be stricken out on the filing of a claim and plea. After the expiration of the ten days, and during the term at which the judgment is entered, the same will only be stricken out for cause shown, and on such terms as the court may prescribe.

Judgment
on forfeit-
ure, when
may be
stricken out.

21.

All claims by informers for a portion of any fine, penalty or forfeiture, under any of the revenue laws of the United States, shall be filed during the term at which such fine, penalty or forfeiture shall be adjudicated by the court; and a copy of the same shall be served on the District Attorney, and its service admitted by him, in writing, at least five days before the court will hear and decide the same.

Informers'
fees.

U. S. DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA.

ADDITIONAL ADMIRALTY RULES.

[For Rules in Admiralty of the District Court of the Eastern District of Virginia, see 2 Hughes, 556, *et seq.*]

154.

In every libel *in rem* process of monition shall be made returnable on Tuesday of the week next after the filing of the libel. In every suit respondent may answer at any time before the return day; and upon notice to the libellant or his proctor, of the filing thereof, the cause shall be at once set for hearing; and the court will then, at its discretion, hear the cause.

155.

When a vessel has been libelled, so long as she remains in the custody of the court, any other creditor must come in by a petition in the form of a libel, giving the usual stipulation for costs. If the vessel is bonded the condition and penalty of the bond must also cover all petitions which have been filed previous thereto. The dismissal of the libel or any petition shall not affect the right of any other petitioner to hold the vessel, provided he has given proper security for costs. Among admiralty claims of otherwise equal dignity, the one first libelling shall be first paid, but petitioners shall be paid pro rata. Where the claim does not exceed fifty dollars, an itemized bill duly sworn to will be treated as a petition.

156.

Ordered, that under the requirements of Rule 29 in Admiralty, prescribed by the Supreme Court of the United States, the answer of the claimant or of any respondent in a libel suit must be filed with the clerk at the return day of process, or within ten days thereafter.

INDEX TO SUBJECTS.

ADMIRALTY JURISDICTION.

I. LAUNCHING.

A contract for "launching" a vessel which has been driven by a great storm, several hundred feet high and dry on the shore is a maritime contract, and may be made the basis of a libel *in rem* in admiralty. *Ella*, 125.

II. RIGHT OF PARTY PROCURING CARGO TO LIBEL FOR DAMAGE TO.

The master of a barge having hired her to the libellant for the storage and transportation of grain in the harbor, and agreed to keep the barge in thorough repair and the libellant having procured a cargo to be put on board and having been obliged to pay the damage which the cargo suffered in consequence of a leak happening from the neglect of the master of the barge to keep her in repair,

Held, That the libellant was entitled to proceed *in rem* against the barge in admiralty to recover the damage paid by him. *Wilmington*, 205.

Held, That as the master in hiring the barge to the libellant, and in stipulating that she should be kept in proper repair was acting within the scope of his authority, the case was within the general maritime rule that whoever deals with the master is entitled to look to the vessel as his security and that the exceptions to that rule are not to be extended except for imperative reasons. *Id.*

III. INJURIES DONE TO PERSON ON WHARF.

An injury done to a man, whilst he is standing on a wharf, by a bale of cotton which is being hoisted aboard a ship loading at the wharf but which falls before it reaches the ship's rail, and strikes him, is not cognizable in the admiralty. *Mary Stewart*, 312.

Nor can jurisdiction over such a tort be given by a state statute. *Id.*

IV. WHEN EXCLUSIVE OF STATE COURTS.

1. A state law which, for a cause of action clearly maritime, either of contract or tort, arising on or committed by a ship engaged in commerce on any public navigable water of the United States, gives a remedy at common law in a state court by attachment *in rem* against the vessel specifically as debtor or offender, is in conflict with section 9 of the Judiciary Act of 1789, giving exclusive jurisdiction in admiralty and maritime causes to the admiralty courts; and this is so, even though the state law provide that the attachment of the ship be "in a pending suit." *Stewart v. Potomac Ferry Co.*, 372.

ADMIRALTY JURISDICTION (*continued.*)

2. A vessel lien law of a state, giving a lien upon any steamboat or other vessel, raft or river craft, for materials or supplies furnished to, or for service performed on, or for injury done by, such steamboat or other vessel; or for wharfage, salvage, pilotage, or claim on contract of transportation, due by such steamboat or other vessel; and authorizing any claimant for such supplies, services, damages or injury, or dues, "in a pending suit," in a court of the state, to sue out an attachment specifically and particularly against "the vessel, her tackle, apparel and furniture," as the debtor, or offender, or tortfeasor, "whether the cause of action arose without or within the state, and whether the owner be resident or not," and before process "in the pending suit" is served, either actually or constructively; such a law, and any proceeding under it, before service, either actual or constructive, upon the real owner of the vessel, violates the third division of section 711 of the Revised Statutes of the United States, giving cognizance to the United States district courts, exclusive of the state courts, of all civil causes of admiralty and maritime jurisdiction;" and this is so, notwithstanding that part of the same provision which "saves to suitors in all cases the right of a common law remedy where the common law is competent to give it." *Id.*
3. Inasmuch as the rules of decision at common law enforce liens upon property in an order radically different from the order in which admiralty rules of decision enforce them, the common law is not competent to afford a remedy against a vessel engaged in commerce upon the public navigable waters, as between suitors having maritime claims against such vessel. *Id.*

V. See *Death, Owner, Parent and Child.*

AFFREIGHTMENT.
I. DAMAGE TO CARGO.

1. Where iron straps and chemical bleaching-powders and soda were stowed near together, and near to cotton, in a ship, so as to injure the cotton ties, and stain some of the cotton, in a rough voyage:
1. *Held*, That the destructive effect to cotton ties of contact with bleaching powders being well known, it was not proper stowage to place them so near together without adequate precaution against injury. *Kate Irving*, 253.
2. *Held*, Under the circumstances of this case, that the market value of the damaged cotton ties was to be determined by the price they actually produced when sold, and not by the testimony of experts. *Id.*
2. Where a schooner, which has been dismasted at sea, with a hole cut in her deck, is abandoned by her crew; the master and mate protesting to those who rescue them that the schooner is leaking and sinking; although the fact was that she was not leaking seriously; was not sinking; and was found twenty-four hours afterwards riding safely at anchor at the place of the desertion, and towed into

AFFREIGHTMENT (*continued.*)

port by another vessel; *Held*, that, by reason of bad seamanship and negligence, the schooner is liable to the owners of the cargo, and their insurers for salvage paid on the cargo, and for damages sustained by its cargo while on the vessel at sea. *James Martin*, 448.

II. JETTISON OF DECK LOAD.

A bill of lading for live beef cattle shipped by agreement on the deck of a steamer for a voyage from Baltimore to Liverpool, in December, 1880, contained, in addition to usual exceptions, a clause exempting ship-owners from any loss that might arise through cattle being jettisoned.

Held, to mean that the ship-owner was not to be liable for contribution if the cattle should be thrown overboard for the safety of the ship. *Enrique*, 275.

Held, That with regard to a deck load of live cattle this limitation of the ship-owner's liability was not unreasonable or against public policy. *Id.*

Held, If the cattle were thrown overboard because, during a prolonged storm, and without any fault of the ship-owner, they had got loose and were imperilling the ship, that under the limitation in the bill of lading the ship is exempted from contribution. *Id.*

III. DELIVERY OF CARGO.

The lien for freight or demurrage of the vessel upon the cargo is terminated by the delivery of the cargo. *Cargo of Fertilizer*, 810.

AVERAGE.

MEANING OF. *Unicorn*, 79.

BILL OF LADING.

See Affreightment, Charter-party.

CHARTER-PARTY.

I. FAILURE OF SHIP TO GO TO CONSIGNEE AGREED UPON.

It being proved that it is the etiquette among ship-brokers in Baltimore to allow the ship-broker who is consignee of a vessel to procure her the outward cargo when she is consigned to him free of commission; in a charter-party containing a provision that the ship should be consigned to a certain firm free of commission, the penalty for a breach of the charter-party, being forfeiture of freight, the consignee, in case of a failure of the ship to come to him, can recover only his actual damages; and the failure to have the privilege of getting for the ship an outward cargo is too remote to be the subject of damages. Nor can proof of the above custom alter or add to the contract contained in the written charter-party. *Welby v. Dressel*, 187.

II. DEPTH OF WATER.

1. It is the duty of the master to determine what depth of water is neces-

CHARTER-PARTY (*continued.*)

sary for loading, and under a charter-party guaranteeing a certain depth for loading, and binding the charterers to lighter the cargo to the vessel if there is not that depth at the place of loading, the master, if he allows his vessel to go to a wharf containing less water than the stipulated depth, cannot recover for damages and delay caused by the want of depth of water there. He should require the charterers to lighter the cargo to the vessel, and can recover demurrage for the delay caused by such a mode of loading. *Tons of Fish Scrap*, 141.

2. Where a vessel is chartered for a voyage to a safe Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lay and discharge afloat, lighterage, if any, to be at the expense and risk of the cargo, *held*, that the vessel could not be ordered to Aalborg, a Danish port, into which a vessel of her tonnage could never get by reason of her draught of water, and where she would have to discharge the whole of her cargo into lighters two miles out in the open water of the Kattegat, at a distance of over 17 miles from the port, and at an anchorage proved not to be reasonably safe for that purpose.

Held, That the fact being that the vessel could not get into the port, and that there was no anchorage near and customarily used in connection with it, where she could safely lay and discharge, it was the duty of the master to refuse to sign bills of lading purporting that he was going to deliver the cargo there, even with the clause inserted, "as near thereunto as the vessel can safely get, and always lay and discharge afloat." *Gazelle*, 391.

3. A ship-owner charters his vessel to certain parties to go "to a safe point on the Continent between Bordeaux and Hamburg, orders to be given on signing bills of lading, * * * cargo to be delivered alongside of vessel, where she can load and discharge always afloat, lighterage if any at expense and risk of cargo." The cargo was loaded and the master without objection signed bills of lading to deliver cargo to charterers at Calais. On arrival, owing to the difficulty and shallowness of the harbor a long delay was experienced in getting to the dock and over the bar. *Held*,
4. That the master must object to the port to which he is ordered at the time of signing the bills of lading, if he considers it unsafe or not up to the requirements of the charter-party; or having accepted the port, must go as near as he can to float with safety and tender the vessel there. *Maggie Moore*, 287.
5. That being agent of the owner his signature of the bills of lading binds the owner, even if ignorant of the character of the port to which the shipment was made. *Id.*

III. DELAY ON EITHER SIDE.

1. Under a charter-party which provides that "the cargo to be loaded and discharged with all quick dispatch, as fast as the captain can receive and deliver," demurrage is recoverable for delay caused by the failure of the vessel to obtain a berth owing to the crowded condition of the docks, even though the charterers used all efforts

CHARTER-PARTY (*continued.*)

- to obtain a berth promptly and all dispatch in unloading after obtaining it. *Steel Rail Ends*, 194.
2. A charter-party provides "that the cargo is to be unloaded at the expense and risk of the charterers, according to the use and custom of the place of loading and discharging," and also for "prompt loading without loss of time, weather permitting, and customary lay-days for discharging." It being proved that it is the custom of the port of Baltimore not to unload brimstone on days windy enough to cause loss of the brimstone: *Held*, that such custom is not unreasonable, and that, under such a charter-party as the above, demurrage cannot be recovered for loss of time caused by such weather. *Cargo of Brimstone*, 201.
 3. Under a charter-party which binds a vessel "now at Genoa and to proceed without delay to Baltimore; vessel having permission to take cargo of coals as ballast out," a delay of 31 days in beginning the performance of the contract, caused by discharging a cargo on board under a former contract, was such a delay as authorized the charterers to cancel the charter-party. *Antola v. Gill*, 284.
 4. Although the consignee, and not the ship, is responsible for delay in unloading caused by the crowded condition of the dock; yet, where the contract is, that the ship shall be at the usual place of unloading before she gives notice of arrival, and the evidence shows that the public dock is the usual place of unloading, and there is nothing to show that the dock was too crowded to allow the ship to moor at it, the ship cannot claim demurrage for delay caused by her failure to go promptly to the dock after her arrival in the harbor. *Ewan v. Tredegar Co.*, 401.

IV. ACCIDENTS TO MACHINERY.

- A steamer leaving for Baltimore in ballast on encountering heavy weather works loose some of the bolts of her shaft, and has to put into a port for repairs. The bolts on being taken out were found to be worn, but the preponderance of expert testimony was that the racing of the screw might have caused this, even though they were in proper condition at the departure. The charter-party contained an exception for delays caused by accidents to machinery. *Held*,
1. That the delay was within the exception, and the accident not a violation of the implied warranty of sea-worthiness. *Pyman v. Von Singen*, 196.
 2. That the failure to take rimers to bore out the bolt holes after they had worked out of shape, and extra bolts to fit them was not negligence on the part of the steamer; as it would have been almost impossible to make the repairs at sea, and it is unusual to go so provided. *Id.*
 3. That the charterers were liable for failure to load the steamer on arrival, although she arrived after the stipulated time. *Id.*

V. ABOUT TO SAIL.

- 1 The words "about to sail" in a charter-party for a ship chartered

CHARTER-PARTY (*continued.*)

whilst loading at a distant port construed to mean "about ready to sail;" it appearing from the evidence that the parties wanted her for a special purpose within a month from the date of the charter-party, and that this was understood by both parties at the time of making the contract. *Von Lingen v. Davidson*, 222.

2. The warranty of prompt departure implied by the above words is broken, when the ship at the date of the charter-party has received only about one-fourth of her load and did not sail till nearly a week afterwards; and the ship-owners are responsible for any damage to the charterers caused by her late arrival. *Id.*

VI. LOSS IN WEIGHT OF CARGO.

The charterers agreed to pay for the vessel a lump sum. They procured, to be put on board by freighters in Liverpool, a cargo of iron ore, at a rate of freight which on the amount of ore put on board, would have exceeded the lump sum which they were to pay. The charter stipulated that the master should give the charterers a draft for the excess of freight between the charter and the bill of lading, the draft to be drawn on the ship's consignee at the port of discharge, payable 10 days after ship's arrival. The charter also contained a stipulation that the charterers were not to be held liable for any loss of freight arising from leakage, breakage, drainage, or any other cause beyond their control. The bill of lading fixed the freight at a certain rate per ton of cargo delivered. On delivery of cargo at Baltimore, there was found to be a considerable loss of weight, and the freight on the actual output was less than the lump sum mentioned in the charter. It appeared that the loss of weight was not attributable to any fault of the ship or owners, and that some loss of weight on such a cargo was always to be expected.

- (1) *Held*, That as the bills of lading called for freight only on the weight delivered, and that as the freight on the actual delivery fell short of the lump sum, there was no excess payable to the charterers. *Naval Reserve*, 233.
- (2) *Held*, That the stipulation that charterers were not to be liable for any loss of freight arising from causes beyond their control, was not to be so interpreted as to entitle them to demand a fictitious excess of freight which the bill of lading did not entitle the ship to collect. *Id.*
- II. The charter-party was executed in Liverpool, between British subjects, and the vessel was a British ship, but the vessel having been attached within the district, and it appearing that all the facts necessary to determine the case were sufficiently proved without taking testimony under a foreign commission, *Held*, that justice would be promoted by taking jurisdiction and disposing of the case. *Id.*

VII. CANCELLATION.

A charterer who cancels a charter-party, under an option accorded him of so doing in the event of the failure of the ship to arrive at

CHARTER-PARTY (*continued.*)

the port of destination by a certain day, cannot, after such cancellation, claim the benefit of a provision of that charter-party agreeing to carry free the cargo from the starting port to the port of destination; but must pay freight on such cargo. Having elected to cancel the contract, he can no longer claim under it. *Bags of Guano*, 410.

2. Damages occasioned to the charterer by the late arrival of the ship, cannot be set off in admiralty against the freight. *Id.*

CIRCUIT COURT. See *Clearance*.

CLEARANCE.**MANDAMUS TO COMPEL.**

The circuit court has power to issue a mandamus to a collector, commanding him to grant a clearance. All instructions from the executive which are not supported by law are illegal and no inferior officer is bound to obey them. *Gilchrist v. Collector*, 1.

COLLISION.**I. LOOK-OUT.**

1. Steamer held in fault in not having a look-out and having failed to observe the lights of a sailing vessel. *David Reeves*, 89.
2. The proper place for a look-out on a tug is where he can best see forward, whether that be in or out of the pilot house. But unless the pilot house is proved to be the best place, a look-out taking his station therein subjects himself to suspicion. *Kirkland*, 109.
3. The office of a look-out being to watch for and report danger from every quarter, he must be in a position to see and give timely notice of danger from astern as well as in front, and if one look-out cannot do this, more must be provided. *Sarmatian*, 153.

II. FERRY-BOATS.

1. Steam ferry-boats crossing crowded harbors between fixed stations at regular intervals have not the exclusive right of way over their usual tracks or courses. *Manhasset*, 104.
2. They are subject to the two laws of navigation requiring steamers to keep out of the way of sail vessels, and requiring steamers to slack up and, if necessary, to reverse their engines when there is danger of collision. *Id.*
3. They must not merely try to comply with these laws, but must actually and effectively comply. *Id.*
4. They must not move across crowded harbors at such speed that, if necessary, they cannot check up and stop in a space twice their own length. *Id.*

III. LIGHTS.

1. Rules of navigation are *laws* requiring implicit obedience. They are to be observed not listlessly but effectively. *Kirkland*, 109.

COLLISION (*continued.*)

2. The rules requiring a steamer approaching a sail vessel to keep out of her way must be obeyed whether the sail vessel have her proper lights up or not, if the sail vessel is seen by the crew of the steamer in time to avoid collision; and must be promptly, energetically and faithfully obeyed. If in such case the sail vessel keeps her course and the steamer runs into her, the steamer is at fault, and must pay the damages. *Id.*
3. A steamer approaching a sail vessel seeing her at some distance, and seeing her lights fluctuating must stop and, if necessary, reverse her engine until the course of the sail vessel is definitely ascertained, especially where the roughness of the sea and small size of the sail vessel may account for such fluctuation without supposing the sail vessel to have changed her course; and for failure so to do the steamer is solely responsible for the collision. *Westover*, 133.
4. It is the duty of a tug when towing with the tow lashed to her side not to permit her colored lights to be so obscured by the tow as to be invisible to a small schooner low down in the water; and the tug is responsible for a collision with such a schooner caused by the failure of the schooner to see her colored lights so obscured. *Conroy*, 143.
5. The lighted torch which section 4234 U. S. Rev. Stats. requires a sail vessel to show on the approach of a steam vessel must be exhibited in time to give the steamer ample notice of the proximity of the sail vessel and enable her to keep out of the way; and it is negligence to postpone its exhibition till a collision is imminent. *Sarmatian*, 153.
6. It must be shown as well when a steamer is coming up astern of the sail vessel, as when approaching from any other direction. *Id.*
7. The fact that the approaching steamer was not an American vessel and that by the law of her nationality torch-lights on sailing vessels are not required, is no excuse for the failure of an American sail vessel in American waters on pilot ground to exhibit them; and the failure to exhibit them in time and to give any other timely notice of her presence was negligence. *Id.*
8. In a collision between a vessel at anchor in a river out of the usual course of navigation, with either no light or an improper light, and no anchor watch, in a fog so thick that the usual lights of vessels could not be seen more than 150 yards off, and a steamer with compasses somewhat out of order, with her look-out in an improper place, and running at a speed of seven or eight miles an hour, both were held in fault, and the damages were divided. *Omega*, 487.

IV. IMPROPER ANCHORAGE.

1. In a collision case between a steamer and a vessel at anchor in which the testimony was hopelessly conflicting as to whether the vessel at anchor had a proper light up, both vessels were held in fault, the vessel at anchor because anchored in a channel in which a state statute forbade vessels from anchoring, and the steamer for running at too great speed in such channel; and the damages were divided. *Helen*, 116.

COLLISION (*continued.*)

2. A state law forbidding vessels from anchoring in a certain channel under penalty of forfeiting all right to recover in case of collision whilst so anchored, is, in the absence of congressional legislation, constitutional in so far as it prescribes where vessels may or may not anchor; but such a penalty cannot be enforced in an admiralty court. *Id.*
3. The Maryland act of 1867 forbidding vessels from anchoring in certain parts of the Annapessex River was not repealed by chapters 151 and 409 of the Acts of 1872. *Id.*

V. CONFLICTING TESTIMONY.

1. In a collision case between a steamer and a schooner, in which the testimony of the crews of the two vessels was irreconcilably in conflict, the court, basing its opinion upon the testimony of the crew of a third vessel in close proximity at the time of the collision, and which was confirmatory of the testimony of the steamer's crew, pronounced the schooner in fault. *S. C. Tryon*, 161.
2. Where, in a libel by the owners of a sailing-vessel against a steamship for damages for a collision, the testimony was in direct and irreconcilable conflict, and the testimony of the libellant's witnesses was discredited because of the improbabilities of the case attempted to be established by them, the libel was ordered dismissed. *Leversons*, 351.

VI. SPEED.

1. *Held* to be a fault for a large steamship in the Brewerton channel of the Patapsco River to keep up her speed of eight miles an hour when the channel was obstructed by a tug and tow ahead which it was apparent must get out of the way to enable the steamer to pass. In navigating such a channel allowance must be made for unusual emergencies, and precaution and care must be increased in proportion to the increased risk and difficulties. *Kate Irving*, 146.
2. It is not negligence for a steamer with proper look-outs, on a night when lights could easily be seen and in a broad expanse like Chesapeake Bay, to proceed at her usual speed in the absence of any apparent danger; for she has the right to assume that other vessels will give the notice of their presence required by the law or usages of the place. *Samartian*, 153.

VII. ESTIMATES OF TIME AND DISTANCE.

Estimates by witnesses in collision cases of time and distance are rarely reliable; the attending facts and circumstances being a safer guide. *Samartian*, 153.

VIII. NEGLECT OF SIGNALS—CUSTOM.

A tug, with a vessel in tow, having given two blasts of her whistle without hearing any reply, steered in a narrow channel to pass an approaching steamer starboard to starboard instead of port to port, and did not repeat her signal until too late to avoid a collision,

COLLISION (*continued.*)

which took place between the steamer and the tow on the extreme edge of the channel. *Held*, that the tug was solely to blame. *Mary Shaw*, 266.

Held, that there is no local custom in the channels in the Patapasco River, and in the Chesapeake Bay, at its mouth, for large vessels descending the channels to take the easterly side, and that the establishment of such a custom, not being called for by any necessity, is to be deprecated as a dangerous departure from the settled rules of navigation. *Id.*

IX. SAIL VESSEL. ALTERING COURSE.

The sailing vessel claimed that she altered her course in *extremis*, and to ease the blow. *Held*, upon the facts as found by the court, that the sailing vessel unjustifiably altered her course, and contributed to bring about the collision; that if she altered her course at all she should have so acted as to aid the steamer in avoiding the collision. *Held*, that the steamer was also in fault, when she had plenty of sea-room, in passing the sailing vessel in the night time so close as to allow a collision to result from a miscalculation of those in charge of the sailing vessel. *Held*, that the damages must be equally divided. *Farnley*, 299.

X. DAMAGES.

1. *Held*, that a person who was unfitted for his ordinary business by the nervous prostration resulting from the fright and anxiety consequent upon a collision, but who suffered no bodily hurt, could not recover damages. *David Reeves*, 90.
2. *Held*, that where a widow filed a libel for damages resulting from the wrongful death of her infant son, who had never been in the habit of contributing money or services for her benefit, the damages were to be confined to the pecuniary value of the services or net earnings of the son during his minority. *Id.*
3. Where injury happens to a person on one vessel from a collision with another vessel, the measure of damages as against the vessel in fault is:
 - (a) Expenses of cure.
 - (b) Compensation for loss of time and wages or earnings whilst disabled.
 - (c) Compensation for pain and suffering endured.
 - (d) Compensation for loss likely to result from any permanent injury inflicted. *Manhasset*, 104.
4. Where a French fishing brig was sunk and totally lost in a collision with a British ship which latter was libelled in Baltimore and adjudged in fault, the measure of damages for the loss of the brig is what it would cost to replace her in France, although she could be replaced in Canada or the United States for a less sum. *George Bell*, 172.
5. Where the brig at the time of the loss had been fishing for three-fourths of the season, an allowance of one fourth of the cost of her outfit for the season is a just item of damage. *Id.*

COLLISION (*continued.*)

6. In such a collision case, the rule of adopting the prime cost of the cargo at the place of shipment with the cost of loading and the cost of navigating the vessel to the place of collision is inapplicable; but, inasmuch as the fish caught up to the time of collision had no definite market value at that place, the true measure of damages for the loss of the fish in the brig when sunk is their value at the nearest French port where there was a market for them, without deduction for the expense of getting there. *Id.*
7. In a case of total loss the probable earnings of the vessel for the remainder of the fishing season can not be considered in estimating the damages. *Id.*

CONSTRUCTION OF VESSELS.

NOT MARITIME CONTRACTS.

1. Materials or machinery furnished or work done in the original construction of a ship or vessel, are not maritime in their nature, and do not give rise to a maritime contract. *Pacific*, 257.
2. Nor can they be made so by a state statute, the only effect of such a statute being to attach a lien to a contract originally maritime in its nature, and not to make a contract maritime which is not so originally. *Id.*
3. Hence, a libel *in rem* on a contract of such a character *dismissed*. *Id.*

CONTRACTS.

In making a contract for "launching," the libellant did not imply or guarantee that he owned the dredges and machinery necessary to effect the launching; but only that he would hire and employ them as far as necessary to the execution of the work undertaken. *Ella*, 125.

COURTS.

COLLATERAL EXAMINATION INTO EACH OTHER'S JURISDICTION.

1. A court in determining the title to property may examine collaterally into proceedings in another court which profess to change the title to such property. *J. W. French*, 429.
2. The doctrine that the first court which obtains custody of property holds it to the exclusion of all others, applies only where its jurisdiction to hold the property is lawful. A mere seizure unauthorized by law is a trespass and does not exclude another court of rightful jurisdiction from taking custody of the property. *Id.*

DEATH.

SURVIVAL OF ACTION FOR INJURIES CAUSING.

Held, that in the Fourth Circuit, since the decision of Ch. J. Chase in the *Sea Gull* (Chase's Dec., 145,) it is settled that damages can be recovered by a libel *in rem* in the admiralty for the wrongful death of a person independent of statutory remedy. *David Reeves*, 89.

DECREE.

INTERLOCUTORY OR FINAL.

A decree in a prize cause directing the payment of money claimed to be subject to condemnation into the registry of the court to await the further order of the court is not a final decree. The only final decree in such a case is the decree which terminates the custody of the court over the fund. *Canoe*, 490.

DISTRIBUTION.

PRIORITIES AMONG CONFLICTING DEBTS.

1. The order of distribution among different maritime claims under the special circumstances of this case indicated. *D. B. Steelman*, 210.
2. Although by the law of Germany the master of a German vessel may have a lien for his wages, yet when the vessel is sold in a port of the United States under an admiralty decree, he cannot assert such a lien, if he has any, against material men in that port with whom he had contracted and to whom he had made himself personally liable. *Graf Klot Trautvetter*, 237.
3. Among maritime liens of otherwise equal dignity, the lien-holder first instituting proceedings to enforce his claim is entitled to priority of payment. *Wm. Gates*, 311.

DUE PROCESS OF LAW.

I. MARYLAND OYSTER LAW.

Under the Maryland oyster law of 1880, an oyster schooner, found dredging in the Chesapeake Bay without a license, was seized, and with her master and crew carried into Annapolis by the state oyster police. The master and crew were tried before a justice of the peace and fined, and upon the non-payment of the fine the vessel was forfeited and sold.

Held, that the forfeiture and sale were valid; that the law was not repugnant to the state constitutional provision, that in all criminal prosecutions every man shall be entitled to trial by jury. *Ann*, 202.

Held, also, that the law was not repugnant to the provision of the federal constitution, that no state shall deprive any person of his property without due process of law. *Id.*

Held, that the seizure of the vessel was notice to the owner, and that, as the law provided for an appeal by the owner from the decree of forfeiture, he could make himself a party to the case and defend his rights. *Id.*

II. VIRGINIA FISHING LAW.

1. A proceeding which purports to divest one man of his property for the alleged act of another, without giving the owner a day in court and a jury trial to defend his property, is void as not being due process of law, whether such proceeding was the act of a court or based on a statute. *J. W. French*, 429.
2. A statute which provides that any person violating it shall forfeit "his vessel, boat or craft," means only to forfeit the property if

DUE PROCESS OF LAW (*continued.*)

- owned by the offender, and does not mean to forfeit the property of one not the offender, even though used by the offender. *Id.*
3. A verdict of a jury which merely finds the prisoner guilty and does not mention the vessel, is not a finding that the vessel was used in the commission of the offense, even though the vessel was named in the indictment. *Id.*
 4. The fishing laws of Virginia (Code ch. 100, and Acts 81-2, p. 235) examined and construed. *Id.*

ESTOPPEL.

Where a ship-carpenter makes for a proposed purchaser of a vessel an estimate of what he will charge for putting her in repair, on the faith of which the vessel is bought, and he afterwards charges much more than he estimated; a court will hold him to his estimate, in the absence of any satisfactory explanation of the excess of charge. *M. F. Parker*, 191.

EVIDENCE.**PRESUMPTION FROM FAILURE TO EXAMINE WITNESS**

1. Where the testimony of the libellant and the ship's officers conflicts, and one of the officers of the ship is not examined on the points in dispute, that circumstance goes to the discredit of the ship's officers. *Sandringham*, 816.
3. The testimony of experienced mariners, of approved credibility, as to the character of the weather, and the practical effect of the wind and ocean swell, or other such facts occurring at sea under their own observation, is a higher and more reliable grade of evidence than the weather reports of the signal service from observations taken on land, and will be preferred by the court in passing upon such facts. *Id.*
3. Where a vessel is abandoned by master and crew under circumstances creating a suspicion that she has been divested and scuttled and left to sink by them, the failure of her owners to examine half her crew who are disinterested in a libel for damages brought by owners of the cargo and their insurers is prejudicial to their case, if they do not account for their failure. *James Martin*, 448.
4. Where, in case of such an abandonment and such a libel, respondents allege that the misfortunes of their vessel originated in a collision at sea with another vessel, and yet fail to libel that vessel, when opportunity offers them, or to take any steps to secure the testimony of the officers and crew of the other vessel as to the collision, the fact that there was any collision at all being denied by libellant, such a failure is prejudicial to the case of the respondents:—this is especially so where a collision in the manner alleged by master and crew of the libelled vessel was physically and mathematically impossible. *Id.*

GOODS AND CHATTELS.**COIN INCLUDED IN.**

Under section 5 of the act of July 13, 1861, prohibiting commercial

GOODS AND CHATTELS (*continued.*)

intercourse between the loyal and insurgent states, gold coin is included in the words "goods and chattels, wares and merchandise," and is forfeited by an attempt to carry it into an insurgent state. *Canoe*, 490.

INFORMATION.**FAILURE TO CARRY LIGHTS.**

1. The penalty imposed by section 4234 of the U. S. Rev. Stats., for failure of vessels or water craft to carry lights, applies to all classes of vessels and water craft mentioned in section 4233; and hence rafts may be proceeded against under this section for such failure by a libel of information and are liable to the penalty therein prescribed. *Raft*, 404.
2. But such a libel must aver the seizure and place of seizure. *Id.*

JURISDICTION.

See *Admiralty Jurisdiction, Courts, Due Process of Law.*

LAUNCH.

1. The launch of a ship newly-built into the waters of a crowded harbor is an event of such danger that the builder must be cautious to give ample warning to passing vessels. The mere hoisting of a flag on the vessel to be launched is not sufficient warning. If the vessel in being launched collides with a passing vessel whose crew is ignorant of the intention to launch at that time, the builder is responsible for the damage caused thereby. *Malster v. Humphreys*, 180.
2. See *Admiralty Jurisdiction, Contracts.*

LIBEL. See *Owner.*

LIEN. See *Distribution, Repairs and Supplies.*

LIGHTS. See *Collision, Information.*

LOSS.**MEANING OF.**

Unicorn, 79.

MANDAMUS. See *Clearance.*

MASTER. See *Admiralty Jurisdiction, Charter-Party, Distribution, Owner.*

MUTINY. See *Prize, Salvage.*

NEUTRALS. See *Seamen.*

OWNER.**I. HOW FAR MASTER MAY BIND.**

1. Although the rule is settled that usually the master has no authority

OWNER (continued.)

to bind the owner for repairs or supplies furnished the vessel in a port of the same state in which the owner resides, *held*, that this restriction of the master's authority is not to be extended beyond the reasons giving rise to it. When therefore the port where the supplies or repairs are furnished, although in one sense a home port, is not the port where the owner resides, and he is not within easy access, and the supplies or repairs are necessary and not unusual in amount, and such as a reasonably prudent owner would have sanctioned if present, the owner may be held liable. *Schultz v. Bosman*, 97.

2. The vessel being a small schooner registered at Crisfield, Md., engaged in trade on the Chesapeake and lying in the port of Baltimore, her owner living in Somerset county, Md., and being in need of a pair of side lights, a fog bell and other absolutely necessary articles of equipment, and the master having no money nor credit, purchased them on the credit of the owner. *Id.*

Held, That as the owner lived at a distance and could not be consulted without delay, and the said articles were required for the navigation of the vessel, the master had authority to bind the owner for them. *Id.*

Held, That a private understanding between the owner and the master by which the vessel was considered between them as sold to the master, could not affect the rights of the libellant. *Id.*

Held, That furnishing supplies and repairs to a vessel being a maritime contract, the admiralty courts have jurisdiction of suits *in personam* brought by material men against shipowners for such supplies or repairs, even when there is no lien on the vessel. *Id.*

II. REMEDIES AMONG.

1. Repairs were put upon a domestic vessel by a firm of ship-builders, of which one of the part owners was a member.

Libel *in personam* was instituted by the firm against all the part owners to obtain a decree against them *in solido* for the repairs. *Brothers*, 282.

Held, That such a libel *in personam*, in which the same person is one of the libellants and also one of the respondents, could not be maintained. *Id.*

2. A material-man who places necessary repairs upon a vessel, may proceed against her *in rem*, although he is a part-owner.
3. His lien in such case is postponed to any other maritime claimants to whom he is personally responsible for their bills; but may be enforced against the other part-owner or his assignees, such as mortgagees of the interest of the other part-owner. *Charles Hemje*, 359.

III. See Parent and Child.**PARENT AND CHILD.**

1. A parent may maintain a libel in admiralty for the enticing away of a child under age by the master of a vessel. *Tillmore v. Moore*, 217.

PARENT AND CHILD (*continued.*)

2. Where the master is running the vessel as agent of the owner, the libel will lie both against him and the owner ; but where the master is owner *pro hac vice* and has sole control of the management of the vessel, he alone is liable. *Id.*
3. The measure of the parents' damages in such a case is the loss of earnings and services consequent upon the abduction, and disabilities of the child arising from exposure, and the expense of curing the child of sickness brought on by such exposure. *Id.*

PIRACY.

Piracy is cognizable before the courts of the United States only when committed on waters outside of the criminal jurisdiction of state courts.

The same of other crimes formerly cognizable in admiralty courts. *Baltinger, exp.*, 387.

Section 5370 of the Revised Statutes of the United States is controlled and limited by section 5328 of the same Title. *Id.*

PRIZE.**I. LICENSE—MUTINOUS CREW.**

1. The act of congress of July 6, 1812, on the subject of license was not an abrogation of the law of nations prohibiting intercourse and dealing with an enemy, but was merely cumulative. *Matilda*, 44.
2. As the president's commission to a privateer authorized only the captain and lieutenant by name, their officers and crew, to make captures, a capture made by the crew while in a state of mutiny and with the captain confined, does not enure to their benefit, and cannot be made so to enure by a subsequent ratification of the captain. *Id.*
3. The ordinary papers of a ship being regular, the mere possession of an enemy's license is no evidence of an intention to proceed to an enemy's port; it being justifiable to carry papers to deceive the enemy. *Id.*

II. CAPTURED SLAVES.

Slaves captured in time of war, cannot be libelled as prize, nor will the district court of the United States consider them as prisoners of war. *Certain Slaves*, 55.

The court considers the disposition of them as a matter of state policy, in which it is not fit that the judiciary should interfere. *Id.*

REPAIRS AND SUPPLIES.**I. MORTGAGE NO WAIVER OF LIEN.**

1. Where a material man, having a considerable claim against a vessel on an account running through several months, some items of which were not maritime, took cash for part of the amount, and notes at short dates for the residue, and a mortgage on the vessel to secure the notes;

REPAIRS AND SUPPLIES (*continued.*)

Held, That the cash payment must be applied to the extinguishment of the items not maritime. *D. B. Steelman*, 210.

Held, Also, that the notes, having been taken at short dates did not waive the lien of the amounts for which they were taken. *Id.*

Held, Furthermore, that the mortgage, being recent, and not prejudicial to other maritime liens, and attended by no acts inconsistent with the rights of other maritime conditions, did not waive the maritime lien. *Id.*

2. This case distinguished from the *Ann C. Pratt*, 1 *Curtis*, 340; and the *Swallow*, 1 *Bond*, 189. *Id.*

II. HUSBAND'S LIEN ON WIFE'S SHIP.

Where a half interest in a vessel was owned by a married woman as her separate estate, by virtue of a law of the place of her residence, her husband can libel the vessel for funds and repairs furnished. *D. B. Steelman*, 210.

III. NATURE OF LIEN FOR—WHETHER CHARTERER MAY CREATE.

1. The implied admiralty lien is a mere right to sue and arrest the ship as being herself the contracting and responsible party. It arises from the acts or needs of the ship herself, independent of any question of ownership or agency, or responsibility of those in whose charge she may be. It exists independent of possession, and is entirely dissimilar to the common law idea of lien. It is a misnomer to call such a right a lien. *Sydney L. Wright*, 474.
2. This lien, or right to sue and arrest, only arises (1) when the ship is herself the immediate and direct recipient of the supplies, and (2) when these supplies are apparently proper and necessary, and are furnished in good faith. When these requisites concur, the presumption arises, in case of foreign vessels, that the supplies were furnished on the credit of the ship. *Id.*
3. A vessel is liable *in rem* for supplies furnished in a foreign port, on the order of a charterer in whose possession she is at the time. *Id.*
4. The authorities on the subject of the origin of liens for supplies reviewed. *Id.*
5. The cases of *The Secret*, 3 *Fed. Rep.*, 665, and *The Norman*, 6 *Fed. Rep.*, 406, distinguished. *Id.*

IV. See Owner.**SALVAGE.****I. AWARD IN CASE OF DERELICT.**

From the origin and history of salvage it is plain that the mere fact of a vessel's being derelict in the modern acceptation of the word (as contra-distinguished from the case of pure derelict, where no owner appears and the residue becomes a droit of the admiralty), does not of itself entitle a salvor to a higher award; but the true rule is that each case must be judged by its special circumstances. *Sybil*, 61.

SALVAGE (*continued.*)II. MEANING OF IN INSURANCE. *Unicorn*, 79.

III. PROPORTION NOT ALWAYS AWARDED.

1. The custom of awarding a proportion in salvage cases originated when commerce was carried on by actual exchange; but in modern times when property is represented by money, the court may decree compensation either numerically or by ratio, as it deems proper. *Sybil*, 61.
2. The rule of fixed proportions in salvage cases no longer obtains in England, and is going out of favor in America. *Marie Anne*, 462.

IV. ELEMENTS OF.

1. The amount awarded as salvage comprises two elements, viz., adequate remuneration given by way of compensation according to the circumstances of each case; and bounty given to the salvor for the purpose of encouraging similar exertions in future cases. The relative amounts of each of these elements given depend on the special facts and merits of each case. *Sandringham*, 316.
2. In addition to the six main ingredients of which a salvage service is composed, as announced in the case of *The Blackwall*, 10 Wall., 1, the court will take into view, as an important consideration, the degree of success achieved, and the proportions of value lost and saved; and will award a higher proportion, even on large values, in cases where both ship and cargo are saved with substantially slight injury, than in cases where only the ship or only the cargo, or only portions of it, are saved. *Id.*
3. The true rule is a payment of all expenses incurred by the salvor, and in addition a sum by way of bounty, the amount of which must vary with the amount of property saved, and with the special circumstances of each case. *Marie Anne*, 462.

V. ON SOUTH ATLANTIC COAST.

Held, That, as every salvage award consists first of the compensation due for the labor and material actually expended by the salvor; and second of the bounty allowed for enterprise, risk and success in the service; this latter ingredient should be larger for salvage services on the long and dangerous seaboard stretching from the Delaware capes to Key West, than on other coasts; especially in cases like the present, where the salvor went 157 miles, along a dangerous coast, in rough winter weather, to the rescue of a vessel in distress. *Mary E. Dana*, 363.

VI. AGREEMENT AS TO AMOUNT.

An agreement to pay a definite sum as salvage for saving a vessel does not bar a proceeding *in rem* for the salvage. *Ella*, 125.

VII. VALUES, HOW ESTIMATED.

A ship on a voyage from Galveston to Liverpool was wrecked at the Virginia capes. Both ship and cargo were saved by salvors, and

SALVAGE (*continued.*)

enabled to complete the voyage. One-half the gross freight to be earned on arriving at Liverpool was included by the court in estimating the value of the property saved. *Sandringham*, 316.

VIII. AWARDS IN SPECIAL INSTANCES.

1. A vessel 300 miles from the coast and 400 miles from Norfolk, with main and mizzen-mast gone, and leaking somewhat, but not beyond the control of the crew, with rudder injured but capable of repair, was taken in charge by another vessel which took the crew off and put on a crew of her own, and ordered them to go to Jamaica. The master of the prize crew, however, carried the vessel to Charleston, against the protest of the owner of the salving vessel. *Held*, that this was not an act of mutiny. *Sybil*, 61.
2. The vessel and cargo being worth \$100,000, one fourth was awarded as salvage and distributed among the different salvors. *Id.*
3. Services rendered by two tugs to a steamer hard aground on the Atlantic coast just above Cape Charles, in pulling the steamer off, the weather being good but the locality dangerous, the whole time occupied being three hours, and neither the tugs nor their crews being in any danger, are salvage services. *Swiftsure*, 228.
4. In such case, the steamer and cargo being worth \$135,000, the court awarded the sum of \$2,500 as salvage. *Id.*
5. A steamer worth, with her cargo and freight, \$200,000, was stranded on Cape Henry, within 100 yards of the shore, where the currents of the Chesapeake bay, encountering those of the ocean, are often very dangerous. Salvors, with a large force of vessels, wrecking apparatus, and men, after a week of hard and dangerous labor, in which the highest degree of skill was shown, succeeded in getting off both vessel and cargo so successfully as to allow them to proceed on their voyage after repairs to the ship. One-fourth of the combined value of the vessel and cargo, and of half the freight, was awarded as salvage. *Sandringham*, 316.
6. A service rendered by a professional wrecker in getting afloat a large steamer aground on Hampton Bar, in Hampton Roads, and too firmly aground to come off unassisted, the means used being a wrecking schooner, a tug, an anchor and cable, a hoisting engine, and a gang of wreckers, the time occupied in actual work being only a few hours, and the entire time during which the employment of the wreckers lasted being less than a day, the weather being good, is a salvage service. *Excelstor*, 416.
7. In such a case, \$700 salvage was awarded, the value of the vessel saved being \$180,000. *Id.*
8. Evidence of other captains, as to what they had paid for having their vessels pulled off in cases alleged by them to be similar, is irrelevant and incompetent. *Id.*
9. A brig loaded with lumber is waterlogged off Ocracoke Inlet, in January, 1882, and telegraphs for a public vessel of the United States revenue service. The libellant hears in Norfolk of her flying signals of distress, and sends a strong wrecking steamer, with pump

SALVAGE (*continued.*)

and all wrecking material on board, 157 miles, to her relief. This tug and the revenue cutter both arrive; and the brig engages the tug; chiefly because she needs such a pump and engine as one on board the tug, which can be got nowhere else between Norfolk and Charleston; and which is necessary to her reaching port. The brig is taken in tow by the tug on a Saturday, and is towed to Norfolk in rough sea and weather, though there were no dangerous storms; but owing to a deficiency of coal on the tug, they have to lie by during head winds for fifty hours out of ninety-six, and do not reach Norfolk, until Wednesday night; the brig all the while having had the libellant's pump and engine on board and in necessary use. The value of all property saved was \$4,300. A libel being filed for salvage, and \$1,000 deposited by way of tender by the respondents,

Held, That that amount must be allowed, but the court stated that a less amount would have been granted if there had been no deposit. *Mary E. Dana*, 363.

10. A small steamer which had filled and become water-logged, near night, in the narrow channel of a very wide river, directly in the path of three large steamers due at that point in a few hours, and which had been left by her crew not anchored, and with no light, was towed out of the channel and fastened to a wharf by another steamer, the whole service occupying four hours. The steamer thus saved was worth \$2400, and the cargo, worth about \$150, was picked up floating on the water, and also saved. One-fourth of the value of the vessel, and one-half of the value of the cargo saved, was allowed as salvage. *Carrie*, 445.
11. An ocean steamer, valued at \$150,000, with a valuable cargo and a large complement of passengers and crew, picked up about 130 miles east of Cape Henry, a brigantine, 84 days out, which had lost by yellow fever four men out of a crew of seven, and towed her into Hampton Roads. The value of the property saved was \$7,700. The court awarded \$3,750 and costs as salvage. *Marie Anne*, 462.

SEAMEN.**I. VOYAGE IN SHIPPING ARTICLES.**

1. Under the act of congress for the government and regulation of mariners, shipping articles which provide "for a voyage from Baltimore to Curaçoa and elsewhere" do not authorize a voyage to St. Domingo direct; the words "and elsewhere" being properly construed in the conjunctive as subordinate to the principal voyage, and not in the disjunctive as authorizing an entirely different voyage from the one designated in the article. *Anon.*, 32.
2. Under shipping articles providing for "a voyage to commence at Baltimore and proceed to Batavia; thence, if required, to one or more ports beyond the Cape of Good Hope, and back to Baltimore," an extension of the voyage to Japan was authorized. *Jones v. Buchanan*, 40.
3. Nor was such a voyage a violation of the rights of neutrals in the wars then prevailing; and a condemnation under the English Orders

SEAMEN (*continued.*)

in Council was contrary to the law of nations and not binding on neutrals. *Id.*

II. WAGES ON BREAKING UP OF VOYAGE.

The seamen of a German vessel the voyage of which is broken up at a foreign port are entitled to their wages up to the date of the termination of the contract and also to two and a half months extra wages as passage money to the port from which they shipped. *Graf Klot Trautvetter*, 237.

III. HARBORING DESERTERS.

1. Section 4601 U. S. Rev. Stats., forbidding the harboring of deserting seamen, is to be read in connection with, and is limited by the words of Section 4612, and applies only to the harboring of deserters from American vessels, and not to the harboring of foreign deserting seamen. *U. S. v. Minges*, 494.
2. The only remedy provided in case of foreign seamen deserting is the extradition process and procedure provided by Section 6280. *Id.*

TORTS.

Under the contract between the ship and the charterers the latter are to employ and pay for the stevedoring, and the ship is to furnish the tackle and falls by which the loading is to be done. Under this contract the ship furnishes a rope, which breaks after a short use of it by the stevedores, and one of the employes of the stevedore is injured by the falling of a cotton bale. *Held*, that there was no privity between him and the ship, he not being a party to nor interested in the contract of charter-party, nor any violation of any duty towards him; and that consequently he could not maintain an action against the ship or her owners. *Mary Stenart*, 312.

WHARFAGE.

Held, on the evidence, that one dollar per ton on the first 300 tons, and half a dollar per ton on the excess of tonnage over 300 tons is ample wharfage for large vessels in the port of Norfolk and Portsmouth; that being the customary rate, except among a few firms, who, though they had signed an agreement prescribing a larger rate, were proved not to have adhered to such larger rate. *Minnie L. Gerow*, 169.





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